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# ROMAN LAW GUIDE.



# ROMAN LAW

## EXAMINATION GUIDE

FOR BAR AND UNIVERSITY.

(Questions and Answers.)

BY

W. ADDINGTON WILLIS, LL.B. [Lond.]  
OF THE INNER TEMPLE, BARRISTER-AT-LAW.

AND

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# PREFACE

TO THE SECOND EDITION.

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IN compiling this Edition our object has been to provide a Work which will be of assistance not only to Bar Students but also to those preparing for the Roman Law Examinations at the Universities.

Nearly all the questions dealt with have been set in actual Examinations, and care has been taken in their selection to secure that they shall, so far as is possible in a Work of this nature, cover every necessary part of the subject and be thoroughly representative.

We desire to acknowledge the valuable assistance given to us by Mr. P. H. WINFIELD, B.A., LL.B., of St. John's College, Cambridge, and of the Inner Temple.

W. A. W.  
D. T. O.

TEMPLE,  
*September, 1904.*



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## REFERENCES.

The references are to the following Works :

Girard, "Droit Romain" (3rd ed.).

Hunter, "Roman Law" (3rd ed.).

Mackenzie, "Studies in Roman Law" (6th ed.).

Maine, "Ancient Law."

Moyle, "Institutes of Justinian" (3rd. ed.).

Muirhead, "Historical Introduction to the Private Law of Rome"  
(2nd ed.).

Poste, "Gaius" (3rd ed.).

Sandars, "Institutes of Justinian" (8th ed.).

Sohm, "Institutes of Roman Law" (translated by Ledlie) (2nd ed.).

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## ABBREVIATIONS.

G. = Institutes of Gaius.

J. = Institutes of Justinian.

D. = Digest.

## I.—HISTORY, SOURCES AND DIVISIONS OF LAW.

MACKENZIE.—Historical Sketch.

MUIRHEAD.—Sections 1—8; 16—24; 42—50; 55—65; 74—84; 88—90.

MOYLE.—Introduction; and Notes to Titles 1 and 2  
• of Book I.

MAINE.—Chapters I.—III.

SOHM.—Part I.

1. *Into what periods may the history of Roman Law be most conveniently divided? Indicate briefly the characteristic features of each.*

The history of Roman Law may be divided into five periods:

I. The period anterior to the XII. Tables (B.C. 449).—Law customary and to a great extent implicated with religious observances.

II. From the XII. Tables to the subjugation of Italy (middle of the third century B.C.).—Law personal and not territorial, applicable only to citizens or to others to whom it was partially extended as a privilege. All legal proceedings being based on the XII. Tables or the *interpretatio* thereof by the Pontifical College, the law of this period is inelastic, having little power of expansion through the necessity of adherence to statutory forms.

III. From the subjugation of Italy to the establishment of the Empire under Augustus (B.C. 31).—The feature of this period is the expansion of the law by the Prætors and the evolution of a *ius gentium* applicable to citizens and non-citizens alike.

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IV. From Augustus to Diocletian (A.D. 284).—Classical period of Roman Law. Development of the law by scientific reasoning.

V. From Diocletian to the end of the reign of Justinian.—Period of codification. Imperial legislation the only recognised mode of effecting changes in the law.

2. *State in their historical order, and briefly explain, the several agencies by which the development of the Roman Law was accomplished.*

The development of Roman Law was effected through three agencies, which, placed in their historical order, *i.e.*, having regard to the periods in which each was the main instrument in the alteration and expansion of the law, are as follows :

I. **Fictions**, in the largest sense of the word, *viz.*, “any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified” (Maine, p. 26). The *Interpretatio* of the *pontifices*, and later of the *prudentes*, comes under this description. Assuming merely to interpret the law of the XII. Tables or later statutes, *e.g.*, the *lex Aquilia*, they gradually modified and expanded the law to meet the necessities of a progressive society.

II. **Equity**, *i.e.*, “a body of rules existing by the side of the original civil law, founded on distinct principles and claiming incidentally to supersede the civil law in virtue of a superior sanctity inherent in those principles” (Maine, p. 28). Equity differs from Fictions in that the interference with the law is open and avowed. It differs from Legislation in claiming authority on the ground of the inherent superiority of its principles and not from the prerogative of the legislator. The introduction of the rules of the *Ius Gentium* through the Edicts of the Prætor and other magistrates illustrate the influence of Equity in Roman Law.

III. **Legislation**, *i.e.*, enactments of a sovereign legislator. It differs from Equity in deriving authority from an external body or person. The binding force of legislative enactments is independent of their principles. It is the latest agency to come into full operation as a regular means of effecting alterations in the Law.

3. *Why were Legal Fictions used as a means of effecting practical improvements in the law? Illustrate from some of the more important of such fictions in English and Roman Law.*

The employment of Fictions to effect improvements in the law is due partly to the conservatism of political societies in the earlier stages of their development and respect for forms and rules established by long usage, partly to the practical impossibility of adapting the law to the changing circumstances of the times by means of direct legislation. By the use of Fictions the modifications rendered necessary by the altered conditions of society were effected without offending the general prejudice in favour of the ancient rules.

The expression "Fiction" in this connection must be understood in its largest sense, namely, "any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified." Using the word in this sense, the most striking examples of the use of fictions for effecting improvements of the law are afforded by the *Responsa Prudentum* of Roman Law and English Case Law. (See Maine's "Ancient Law," Chapter II.)

4. *Give an account of the circumstances leading to the enactment of the Twelve Tables, and indicate the general character of these laws.*

The enactment of the XII. Tables was the result of a crisis in the constant struggle, during the earlier period

of the Republic, between the plebeians and patricians. Amongst many grievances under which the plebeians laboured, not the least were the uncertainty of the law as affecting plebeians and the exclusive control of the administration of justice exercised by the patricians. The customary law of the patricians was closely implicated with the gentile *sacra*, in which the plebeians had no part; the plebeians had their own customs but these depended for their enforcement on patrician magistrates. Hence arose a duplication of legal rules; and in the relations of the two orders, the interpretation of conflicting usages and the administration of justice generally were constantly in the interests of the ruling class, and to the disadvantage of the plebeians. This was especially marked in connection with that constant subject of dispute, the occupation of public lands, and in the treatment of defaulting debtors. To remedy this state of things the tribune Terentilius Arsa, in B.C. 462, proposed the election of five commissioners to draw up laws defining the powers of the consuls. The Senate refused to assent, but the plebeians supported the tribune and re-elected the same tribunes for eight years in succession. The Senate endeavoured in vain to stay the agitation by making smaller concessions, *e.g.*, by assenting to the *lex Iulia* (457 B.C.) by which the public lands on the Aventine were portioned out among the poorer citizens, and by sanctioning a measure being submitted to the *c. centuriata* limiting the amount of fines which the consuls should have power to impose. Eventually, in B.C. 452, a compromise was arranged: ten commissioners were to be appointed (plebeians being eligible), with supreme power for one year, for the purpose of compiling a complete collection of laws. Next year the ten commissioners (*decemviri legibus scribendis*) took office. They drew up a body of laws which was approved by the Senate and the *c. centuriata*, and was at once published on ten tables of bronze. Their powers were extended for another year, and they drew up two more tables which were subsequently

sanctioned, with some modifications, under the consuls Valerius and Horatius, after the decemvirs had been expelled from office.

The XII. Tables are, to a great extent, an embodiment of pre-existing customary rules. The style is concise and imperative, and the rules, for the most part, are stated in very general terms, leaving a large discretion to those who had to interpret them. Procedure and penal provisions, as in all bodies of early law, occupy a large space, while there is very little trace of provisions relating to contract. The distinctive feature of these laws, however, is that in the main they constitute a body of *civil law*. "It is a system of *ius* as distinguished from *fas*." Being applicable to all citizens, to both orders alike, the laws enacted are, for the most part, secular, and religious rules and sanctions occupy a secondary position.

5. *Explain the different modes of legislation employed at various periods at Rome.*

I. *During the Regal period*: Nothing known with certainty. Laws were probably promulgated by the King, after consultation with the Senate, and in some cases, chiefly in matters of a semi-private nature, were submitted to the **c. curiata** for its approval. Many of the so-called laws were, in all probability, of a quasi-sacred nature, and were such rules of custom and opinion as required declaration or penal enforcement.

II. *During the Republic*: **Leges** enacted by the **c. centuriata**, or by the **c. tributa** [after its creation, probably by the Valerio-Horatian law (B.C. 449)]. **Plebiscita**, passed by the **concilium plebis**, and having the force of law after the **lex Hortensia** (B.C. 287).

III. *During the earlier Empire (to the time of Diocletian, A.D. 284)*: **Senatus consulta**—enactments of the Senate; constitutions (**decreta**, **rescripta**, **edicta**, etc.) of the Emperors.

## 6 HISTORY, SOURCES AND DIVISIONS OF LAW.

IV. *During the later Empire (after Diocletian) : Constitutions of the Emperors.*

6. *Show how Plebiscita came to have the force of laws. During what period did legislation by Plebiscita prevail, and to what classes of subjects was it applied?*

( At first the enactments of the **concilium plebis** bound the plebeians alone. The **lex Valeria Horatia** (B.C. 449), according to Livy, made *plebiscita* binding on both *populus* and *plebs* ; ) but it is probable that confirmation by both the *com. centuriata* and the Senate was necessary. The **lex Publilia** (B.C. 339), which apparently contained a provision to the same effect as that of the **lex Valeria Horatia**, probably dispensed with the consent of the *com. centuriata*. The **lex Hortensia** (B.C. 287) dispensed with the *auctoritas* of the Senate, and *plebiscita* thus came to have the force of laws. *Plebiscita* were passed during the Republic, and after the *lex Hortensia* they dealt chiefly with matters of private law ; whilst the *com. centuriata* dealt with public matters, such as elections and questions of peace and war.

7. *What was the Ius Gentium? What was its relation to the Ius Naturale?*

“ The history of Roman Law is the history of the gradual supersession of the *Ius Civile* by the *Ius Gentium*.” Discuss this passage, and give examples of the change referred to.

The **Ius Gentium** was, in its origin, a system of rules introduced by the **prætor peregrinus** for regulating transactions between non-citizens, or between citizens and non-citizens, which rules were eventually adopted, chiefly through the medium of the edicts of the urban magistrates, as part of the general law. Thus, in its later development, it means that portion of Roman Law which is of general application, not confined to transactions between citizens or persons having *commercium*. During the Republic purely empirical, its extension in the early empire was the work of scientific jurists, “ a combination of compara-

tive jurisprudence and rational speculation." "It was an independent international private law, which, as such, regulated intercourse between peregrins, or between peregrins and citizens, on the basis of their common *libertas*."

The *ius naturale* was a conception, derived from Greek philosophy, of a law based on Nature—that is, composed of rules of universal application as springing from the common nature of mankind. The characteristic of both systems, the practical rules of the *ius gentium* and the speculative system of the *ius naturale*, was Equity, *i.e.*, the universality of their application, or (according to Maine) their "levelling," equalising effect, making no distinction between the citizen and the non-citizen. This led to the identification of the *ius gentium* with the *ius naturale*, which, in the writings of the jurists, except in one or two passages, are treated as synonymous.

*Ius civile*, as used in the passage quoted, means the ancient law of Rome applicable only to citizens or others to whom it was extended as a special privilege. It was law founded on the customs of an agricultural community in an early stage of development, and ill-adapted to the requirements of an extensive commerce and a cosmopolitan empire such as Rome subsequently acquired. Its main features were elaborate formalism and principles based on tribal and family organisation. The characteristics of the *ius gentium*, on the other hand, were its disregard of forms, and adherence to the principle that effect should be given to the intention of the parties, and the preference of natural ties of blood to those arising from the agnatic family organisation. The gradual extension of the Roman empire over the whole of the civilised world necessarily rendered the exclusive ancient law more and more unsuited to the circumstances of the times, and it was gradually superseded by the *ius gentium*. Thus, agnate succession gave way to the claims of cognate relationship; possession as distinct from property received protection; informal methods of acquisition and transfer of property and informal contracts received recognition.

8. Explain the position of the *Prudentes*, and give examples of the development of Roman Law by means of juristic interpretation.

Compare the **Responsa Prudentum** with English Case-Law.

I. The **Prudentes** were eminent lawyers, whose practice it was to give legal advice publicly to all who chose to resort to them. During the later Republic this practice was adopted by the official class as a means of increasing their influence. It dated from the breaking down of the monopoly of technical knowledge and interpretation of the law, which for two centuries after the XII. Tables rested with the Pontifical College. This had been brought about by (1) the publication by **Cnæus Flavius** (B.C. 304) of the calendar of *dies fasti* and *nefasti* and of the *formulae* of the *legis actiones*; (2) the departure taken by **Tiberius Coruncanius**, the first plebeian Pontifex Maximus, who, about B.C. 254, publicly proclaimed his willingness to give information on legal questions to all applicants; (3) the publication by **Sextus Ælius Pætus** (about B.C. 204) of the **Ius Ælianum** containing the XII. Tables, the *interpretatio* of the Pontifices, and the *formulae* of actions.

From the time of Tiberius Coruncanius, the technical development of the law and the business of interpretation fell more and more into lay hands, and the class of professional jurists arose whose *Responsa* came to be regarded as authoritative.

Cicero describes their functions as (a) *respondere*, the delivery of opinions; (b) *cavere*, the advising as to procedure, e.g., in choosing and settling a *formula*; (c) *agere*, the actual participation in an action on behalf of a client; (d) *scribere*, the drafting of legal documents.

In his time the *prudentes* commenced to apply themselves to the interpretation of the Prætor's Edict, and did not limit themselves to the law of the XII. Tables.

II. Augustus introduced a great change in the position of the *prudentes*. With a view of bringing them into the

scheme of the new imperial system he introduced the practice of conferring on certain eminent jurists, as a privilege, the power of giving authoritative *responsa* which should be binding on the magistrates and judges (*ius respondendi*).

III. In course of time, owing to the increase in the number of the jurists authorised to give binding *responsa* and to the conflicting character of the latter in many cases, the judges were placed in a great difficulty. A solution of this was attempted by Hadrian, who enacted that where all the *responsa* were agreed they should bind, but if they differed the judge might follow which he pleased.

[Effect of this enactment :—(1) according to Moyle, it authorised the citation not only of *responsa* but of any written work of an authorised jurist; (2) according to Muirhead, the judge had to consult all living authorised jurists; if unanimous, he was bound to follow their opinion; if they differed, he could follow which opinion he pleased.]

(IV. Subsequently, owing to the practice of regarding, not only the *responsa*, but also the general legal writings of jurists possessed of the *ius respondendi*, as authoritative (a practice which appears to have been authorised by Hadrian's constitution), the same kind of difficulty again arose. The Emperors attempted to meet this by enacting laws dealing with citations and limiting the number of works which should be regarded as authoritative) *e.g.*, Constantine declared the notes of Paul and Ulpian on Papinian as devoid of authority. The latest and best known of these laws dealing with citations was **The Valentinian "Law of Citations"** (A.D. 426) which was as follows: (a) Where opinions conflicted, the judge must adopt that supported by the greater number of jurists; where opinions were equal, if there was an opinion of Papinian, it must be followed, otherwise the judge might follow any opinion he pleased; (b) The authority of the writings of Papinian, Paul, Gaius, Ulpian, and Modestinus, was confirmed, and also the

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opinions of other jurists therein cited, provided "*codicum collatione firmentur.*"

[As to the different views of the effect of this enactment, see Moyle's Introduction, pp. 65—67, and Sohm, pp. 121—123.]

No provision appears to have been made for omitting what was obsolete or reconciling the texts with later legislation. This was not effected until the compilation of the Digest under the orders of Justinian (A.D. 533).

*Development of Roman Law by interpretation.* Examples : (i.) The extension of the *legitima tutela* to the case of patrons (G. I. 165). (ii.) The extension of liability for damage caused by a quadruped to the case of damage caused by any other animal (D. 9. 1. 1. 4). (iii.) The employment of the *mancipatio* to effect various transactions *fiducie causa*, acting on the provision of the XII. Tables, "*cum nexum faciet mancipiumve uti lingua nuncupassit, ita ius esto.*"

**Responsa Prudentium and Case Law.**—Both are founded on fictions ; the *responsa*, on the assumption that the jurists were only applying the law of the XII. Tables, while they were in fact developing new rules of law never contemplated by the authors of that code ; English Case Law, on the assumption that the judges are only acting on precedent, while they are really, in many cases, laying down new law. But the *Responsa Prudentium* was the work, not of the judiciary, but of jurists, who, during the Republic, were unofficial ; in other words, of the *Bar*. Case Law on the other hand is the production of official judges, of the *Bench*.

9. Give some account of the Sabinian and Proculian schools of law.

These were rival schools of law which flourished during the early empire, and which are supposed to have owed their foundation to the rivalry between the two celebrated jurists, M. Antistius Labeo and C. Ateius Capito, in the time of

Augustus and Tiberius, although they take their names from Proculus and Masurius Sabinus, the respective successors of these jurists. They were probably associations of student ; on the model of the Greek schools of philosophy, in which the professor, some leading jurist, was president ; the presidency passing by some regulated mode of succession. The differences between the two schools seem to have been in matters of detail rather than on questions of legal principle.) Examples of the more important differences are to be found in Gaius III. 141—whether there can be a contract of sale for other than a money price—and IV. 114—whether a defendant who satisfies the plaintiff after *litis contestatio* ought to be condemned. (After existing for about two centuries the rival schools disappeared about the time of Papinian.)

10. What were the difficulties which arose in the later empire in connection with *Responsa Prudentum* as a source of law?

How were these difficulties dealt with (a) by the Law of Citations, (b) by the promulgation of the *Digest*?

The authority, conferred on certain jurists, of giving binding opinions (***ius respondendi***) was at first confined to the *responsum* expressly delivered by the jurist with reference to a particular action. It gradually became the practice to collect these *responsa* and to regard all *responsa* found in the collections as authoritative. This practice was expressly recognised by Hadrian. As a result, it became possible for conflicting *responsa* to be produced to the judge. With the development of the classical juristic literature the authority attributed to the *responsa* was extended to the writings of the jurists. The practice of conferring the *ius respondendi* was discontinued about the reign of Diocletian, and from that time authoritative *responsa* could only be delivered by the Emperors by rescript. In the quotation of authorities the distinction between those who had the *ius respondendi* and those who had not, ceased to be observed,

and the other writings of the jurists came to have equal authority with their *responsa*. To settle the conflict of authorities thus arising, several Laws of Citations were enacted, the most important of which was that of Theodosius II. and Valentinian III., issued A.D. 426. This confirmed the authority of the writings of the five great jurists, Gaius, Papinian, Ulpian, Paulus, and Modestinus, and provided that the judge should be bound by the opinion of the majority of these jurists; if the numbers were equal, the view of Papinian was to prevail; if, in such case, no definite opinion on the case under consideration could be extracted from the writings of this jurist, the judge might select from the conflicting views at his own discretion. The defect of this Law of Citations was that it did not attempt to exclude what was obsolete or to furnish any guide to the judge for giving effect to the changes in the law produced by Imperial legislation. This was attempted, and to a great extent achieved, by the Digest of Justinian.

[As to the different views of the effect of the Law of Citations, see Moyle, pp. 65—67, and Sohm, pp. 121—123.]

11. *What was the Prætor's Edict? State some of the changes in Roman Law due to this agency.*

The **Prætor's Edict** was a statement, published by each Prætor at the commencement of his year of office, of the rules which he would observe in the administration of justice. By the **lex Cornelia de edictis** (B.C. 67) he was forbidden to deviate from the rules laid down in his edict during the term of his office. This general edict was known as the **edictum perpetuum** to distinguish it from **edictum repentinum**, an edict or order issued for some special occasion. The Edicts of the Prætors and also (probably) of the other magistrates were consolidated and arranged by Salvius Julianus in the reign of Hadrian, and received statutory authority.

The chief changes effected by the Prætor were (a) the recognition of possession and equitable (bonitarian) ownership as opposed to legal (quiritary) *dominium*; (b) the recognition of cognate or blood relationship in the law of succession; (c) the development of a simpler form of testament, superseding the will *per æs et libram*; (d) the recognition of informal contracts.

12. State what you know of the history of the Prætor's Edict, and describe the way in which it contributed to the development of Roman Law. Compare the Roman *Ius Prætorium* with English Equity.

The practice of issuing edicts was very ancient, and had been adopted by the kings in the exercise of the *imperium* with which they were invested on their accession. On the abolition of the monarchy, the practice was followed by all the higher magistrates having the *imperium* when promulgating regulations to which the citizens were bound to render obedience. In 367 B.C. the judicial functions were separated from the consular power, and became the province of a special magistrate, the **Prætor Urbanus**, who from that time presided over the administration of justice. The Prætor's Edict consequently acquired special importance, as being the instrument by which he intervened in the interests of public order in cases where no remedy was provided by strict law. A large number of such cases arose as commerce developed and foreigners resorted to Rome for purposes of trade, the old *ius civile* only applying to citizens; and in B.C. 242, it was found expedient to appoint a special Prætor, known as the **Prætor Peregrinus**, to deal with such cases. The earlier edicts probably referred to particular cases, and were what were afterwards termed *edicta repentina*. But, in process of time, another kind of edict came into use, in which the Prætor set out general regulations which he intended to follow during the whole of his term of office, this being

known as *edictum perpetuum*, to distinguish it from the *edictum repentinum*, or order issued for a particular occasion. The practice probably arose from cases of a similar nature being constantly brought before him, and suggesting the expediency of providing a general rule. It became usual for each prætor, on taking office, to issue such an edict, adopting so much of his predecessor's edict as had been found beneficial, and adding any new regulations he deemed advisable. The part of the edict adopted from his predecessor was termed **E. tralaticium**, the part newly added, **E. novum**. At first, the Prætor was under no strict obligation to conform to the rules published in his perpetual edict, but in course of time, it came to be regarded as a gross breach of trust to depart from them, and this was made illegal by a *lex Cornelia* (B.C. 67). It was one of the charges in Cicero's oration against Verres that he had not adhered to the rules laid down in his edict.

By means of the edicts of successive prætors, a great system of law modifying and supplementing the old *ius civile* was gradually built up. The edict contributed to the development of the law in three ways :

I. By *emendation* (*emendandi gratia*) of the *ius civile*, e.g., in giving *bonorum possessio* to a person not strictly heir.

II. By *supplementing* (*supplendi gratia*) the *ius civile*, e.g., extending legal protection to *peregrini*, and to "possession" as distinct from property.

III. As *auxiliary* (*adiuvandi gratia*) to the *ius civile*, e.g., allowing *utiles actiones*.

**Edictum Perpetuum of Salvius Julianus.**—The Edicts of the Prætors became stereotyped in course of time. Each prætor took over his predecessor's edict practically unchanged, and, after the consolidation of the Imperial power, little or no alteration was made in the law by this means. What remained to be done was to revise and arrange the Edicts and give them permanent authority. This was

effected by Hadrian, who commissioned (A.D. 129 *circa*) the great jurist, *Sabius Julianus*, to revise and arrange the edicts of his predecessors, including the edict of the curule ædiles. The revised edict, known as the *Edictum Perpetuum* in a special sense, was then ratified by a *senatus consultum*, and henceforth became statute law.

*Comparison between Ius Prætorium and English Equity.*— Both involve the assumption of a body of rules claiming authority on the ground of the intrinsic superiority of the principles on which they are founded. Both are, in the main, systems supplementing the deficiencies of the older law. But (1) the *Ius Prætorium* was administered by the ordinary tribunals; English Equity by a distinct and extraordinary Court, that of the Chancellor: (2) generally speaking, they are concerned with different subjects, *e.g.*, English Equity dealing with Trusts, which the Prætorian law did not touch; and the Prætorian law with intestate succession, with which English Equity did not interfere.

13. *Illustrate the statement that the Prætor developed the substantive law of Rome by means of his control over procedure.*

The Prætor could not directly create a new rule of law, nor abrogate an existing one. That could only be effected by direct legislation, by a *lex*, a *plebiscitum*, or a *senatus consultum*. But, in order to enforce his rights, the suitor had to apply to the Prætor, and by allowing an action to be brought where the law did not provide one, or refusing an action where by the strict *ius civile* it would lie, or by allowing a defence (*exceptio*), on equitable grounds, the Prætor was able virtually to alter the law and practically neutralise an unsatisfactory law. Thus, a person who was drawn into an obligation by fraud was bound by strict law: the Prætor did not directly say that he should not be so bound; he only said "*Exceptionem dabo*." Again, *Capitis deminutio* extinguished debts. The Prætor did not say that

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the debt should not be extinguished; he announced "*In integrum restituum.*" In the same way, when he conferred the inheritance on a person who was not the heir at law, he did not say, "*Heres esto, familiam habeto,*" but "*Bonorum possessionem dabo.*"

14. Give some account of the Curule Ædiles. In what way and to what extent did they influence the development of the law?

The office of **Curule Ædile** was probably established about the same period as the Prætorship. The first Curule Ædiles appear in 365 B.C. At first the office was exclusively reserved to the patricians, but in course of time was thrown open to plebeians also. Their functions were originally connected chiefly with the celebration of the public games; subsequently their duties were extended to (1) the control of the police and the supervision of buildings, etc., and matters connected with public health; (2) the regulation of the supply of grain and the public markets.

Like the Prætors, the Curule Ædiles issued an edict on entering office. Their powers extended to inflicting fines in respect of nuisances, unwholesome provisions, weights and measures, and hoarding of grain. Their judicial powers were exercised in connection with the markets, and it was through their edicts that the commercial law of Rome, especially the Law of Sale, was developed.

15. Trace the rise and fall of the power of the Roman Senate as regards legislation in the domain of Private Law.

"The legislative power of the Senate was a bridge between that of the comitia and that of the Emperor." Explain this.

(Down to the close of the Republican period the legislation of the Senate was mainly concerned with public matters

connected with the administration of Rome and the Provinces and foreign relations. Although equal authority with the enactments of the *populus* was claimed for its resolutions, this contention was constantly resisted by the popular party.) It seems, however, to have been warranted by usage, and by degrees extended itself to private law, although very little trace of this is to be found in the pre-imperial period. (Under the early empire, the extension of the suffrage made the *comitia* a most inconvenient medium of legislation, and it became usual to ascribe the force of *leges* to the *senatusconsulta* without sending them to the *comitia* for approval. This became the ordinary method of legislation. The expression *lex* came to be applied to resolutions of the Senate, and the meetings of the Senate are sometimes described by the term "*comitia*." The Emperor, as succeeding to the powers of the republican magistrates, was invested with authority of making laws without reference to the Senate or the *comitia*, and a law of A.D. 12 provided that the edicts of Augustus should have the force of *senatusconsulta*. This authority was at a later period conferred on the Emperors at their accession by a general *lex de imperio*, which gave to their enactments the force of statutes. The Emperors, however, in the earlier period, usually made use of this authority only with reference to particular cases by means of *rescripta* and *decreta*. They did not venture at first to assume openly a power of general legislation. It became the practice to treat the *oratio* of the Emperor proposing a new law as law apart from the sanctioning *senatusconsultum*, and the legislative power of the Senate gradually declined, and after the reign of Septimus Severus ceased altogether. From that period the whole legislative authority of the State concentrated itself in the hands of the Emperor. The Senate, being more amenable to influence than the *comitia*, was thus made use of as a convenient instrument in the transition from popular to imperial legislation.)

16. "*The true period of Roman Statute Law does not begin till the establishment of the empire*" (Maine, "*Ancient Law*"). *Explain this.*

(In the earlier stages of social development it is very rarely that legislation by statute is resorted to in effecting reforms in private law.) The implication of law with religion, the natural conservatism of the people, and the lack of acquaintance with the law of those in whom the direct legislative authority is vested, all combine to prevent the law being altered by direct legislation. (Law at this period is brought into line with the requirements of the age by agencies modifying and developing it from within—Interpretation and Equity. Direct legislation is only employed where some constitutional change is to be effected or some serious defect in the existing law affecting a large section of the people is to be remedied. At a later period, when a strong central authority has consolidated itself, the superior efficacy of direct legislation as a means of making improvements in the law is recognised, the internal development of the law gradually ceases, and henceforth alterations in the law are made deliberately and from without. This stage was not reached at Rome until the establishment of the Empire.)

17. *Give an account of the various compilations of Roman Law attempted before the time of Justinian.*

I. **Codex Gregorianus.**—A collection of Imperial constitutions, chiefly rescripts, from the time of Hadrian to about the end of the third century, principally rescripts of Septimus Severus and the succeeding emperors. It was compiled about the end of the third or beginning of the fourth century A.D.

II. **Codex Hermogenianus.**—A collection supplementary to the foregoing and made somewhat later. It comprised constitutions issued under Diocletian and Maximian

(A. D. 284—305), though seven constitutions of Valer. and Valentinian (A.D. 364—365) are attributed to it in the *Consultatio Veteris Cuiusdam Iurisconsulti*. These, however, were probably added to it by some compiler of a later date.

**III. The Theodosian Code.**—In A.D. 435 the Emperor Theodosius appointed a commission of sixteen persons to make a compilation of imperial constitutions from the time of Constantine. It was completed in A.D. 438, and promulgated simultaneously by Theodosius II. in the East, and Valentinian III. in the West, as the sole authority on imperial legislation from Constantine to that date. It consisted of sixteen books, each book being divided into titles, according to the subject-matter, and the constitutions being arranged chronologically under the various titles. In so far as it dealt with private law (*i.e.*, in the first five books), it followed the arrangement of the commentaries on the edict. The later books are concerned with constitutional, administrative, criminal, ecclesiastical, and other public ordinances.

IV. Three compilations of Roman Law for the use of their Roman subjects were made by the barbarian conquerors who overran the Western Empire—

(a) *Lex Romana Visigothorum* or *Breviarium Alarici* (A.D. 506), comprising a collection of imperial constitutions taken from the Theodosian Code and some novels of later Emperors, and excerpts from the writings of Gaius, Paul, and Papinian.

(b) *Lex Romana Burgundiorum* (A.D. 517), based on the foregoing collection of Alaric, but containing also some excerpts from the writings of the great jurists not comprised therein.

(c) *Edictum Theodorici* (A.D. 500 circa), containing a collection of rules in statutory form extracted from imperial

constitutions and the writings of Paulus. Private law occupied a very small space in it.

V. In addition to the foregoing, several fragmentary compilations of Roman Law prior to Justinian have survived. The most important are those known as (1) *Fragmenta Vaticana* (probably about A.D. 320); (2) *Mosaicarum et Romanorum Legum Collectio* (date very uncertain); (3) *Consultatio Veteris Cuiusdam Iurisconsulti* (probably during fifth century). They all contain extracts from the imperial constitutions and the writings of the great jurists.

18. In the introduction to the *Institutes of Justinian*, that Emperor says that they were compiled "after the completion of the fifty books of the Digest or Pandects." Say what you know of this last-named work. Justinian goes on to say that the *Institutes* were "compiled in particular from the Commentaries of our Gaius." Say what you know of this person.

(The Digest or Pandects (**Digesta** or **Pandectæ**), consisted of fifty books compiled by Tribonian and sixteen others from the writings of the Roman jurists. The Digest contains fragments taken from thirty-nine of the most eminent lawyers, each fragment bearing the name of the author and of the work from which it is taken. They are arranged, according to Blume, into three distinct groups) corresponding to the order of the first three years of instruction in the school of law, (namely: (1) dealing with the works of Sabinus; (2) commentaries on the Edict; (3) the works of Papinian. The whole labour was accomplished in three years, and the Digest received imperial sanction in A.D. 529.)

**Gaius** lived in the reign of Hadrian (A.D. 117—138), Antoninus Pius (138—161), and Marcus Aurelius (161—183). Very little is known of him, and his reputation is derived from his legal writings. He appears not to have gained recognition as a leading jurist during his lifetime, and

Mommsen conjectures that he was a professor of law in the provinces, probably at Troas in Asia. He describes himself as a Sabinian. In addition to the Institutes he wrote treatises on the XII. Tables, the Edicts, the *lex Papia Poppæa*, the works of *Scævola*, and the *Sca. Orphitianum* and *Tertullianum*; and also seven books of *Res Quotidianæ* or *Aureorum*, which obtained great reputation. (There are 535 extracts from his writings in the Digest. His works came in time to be regarded as authoritative, and in the Law of Citations (A.D. 426) he was included among the five jurists whose writings were invested with statutory authority.)

19. What was meant by the *Corpus Iuris Civilis*? When and by whom were its different parts compiled? Indicate briefly the object of each part.

The **corpus iuris civilis** is the term applied to the whole body of Roman Law comprised in the works of Justinian. These were:

I. *Codex Vetus* (A.D. 529), consisting of a collection in twelve books of the Imperial Constitutions, based upon the Theodosian code and compiled by ten Commissioners.

II. *Digesta* or *Pandectæ* (A.D. 533), being a collection of treatises on the whole law, compiled from the writings of the jurists under the superintendence of Tribonian and arranged on the model of the Perpetual Edict.

III. *Quinquaginta Decisiones*, being fifty decisions settling disputed points of law raised during the compilation of the Digest.

IV. *Institutiones* (A.D. 533), the legal text-book for students, compiled by Tribonian, Theophilus, and Dorotheus.

V. *Codex Repetitæ Prælectionis* (A.D. 534), the second code, which superseded the first code and incorporated the Fifty Decisions; drawn up under the supervision of Tribonian.

VI. *Novellæ Constitutiones*, consisting of constitutions issued by Justinian, subsequent to the above publications, to effect further reforms in the law.

20. *Show how the religious cult of the Family affected the institutions of primitive Roman Law.*

We have very little reliable information with regard to the usages of the plebeians anterior to the XII. Tables, but it is clear that the patrician family law was very closely implicated with the religious observances of the family and the *gens*. Thus, marriage was a religious duty for the purpose of continuing the existence of the family and preserving the family *sacra*. If there was a danger of the succession coming to an end through failure of issue, an heir could be adopted or nominated by testament. The sanction of the *comitia curiata* and of the Pontiffs was required, so that the *sacra* of the family of the heir so adopted or nominated might be safeguarded. Traces of this are observable in the formalities connected with *Adrogatio* in later law. The original object of both Adoption and the Testament was thus the provision of an heir to continue the existence of the family and attend to the family *sacra*.

21. *In what way, and to what extent, did the introduction of Christianity affect the development of Roman Law?*

The influence of Christianity on Roman Law is often exaggerated by ascribing the humane legislation of the Early Empire to Christian influences. This is clearly an error. The humane spirit which pervaded the Imperial legislation had manifested itself long before the new religious ideas could have exercised any appreciable influence, and is attributable to the spread of culture and the doctrines of Greek philosophy. It is not until Christianity had been publicly recognised by Constantine and declared to be the religion of the State by Theodosius, that we find clear traces

of its influence. It then becomes apparent chiefly in legislation securing privileges to the clergy, abolishing laws inconsistent with the doctrines of the Church, and in some cases recognising Christian institutions as part of the machinery of State. It is found mainly in the following directions: (1) repeal of the laws relating to celibacy; (2) restrictions on divorce, second marriage, etc.; (3) institution of the bishop's court and recognition of acts done in the presence of the clergy, or recorded in church records. (4) enactments as to gifts and supervision of charities: (5) disabilities imposed on heretics and apostates.

**22.** Explain the meaning of *Ius Publicum* and *Ius Privatum*.

Translate and explain carefully:—*Publicum ius est quod ad statum rei Romanæ spectat, privatum quod ad singulorum utilitatem pertinet. Dicendum est igitur de iure privato quod tripartitum est.*

“**Ius Publicum** is law relating to matters affecting the Roman State: **Ius Privatum** that which concerns the interests of private individuals. It may then be said of Private Law, that it is of threefold origin.”

Public Law, according to the Roman conception of the term, included (i.) constitutional law (including administrative law); (ii.) the law relating to the priesthods and *sacra*; (iii.) criminal law. It is not treated of in the Institutes (except as to some criminal enactments dealt with in the last title of the Fourth Book), which deal only with the law affecting the rights of individuals, *i.e.*, *ius privatum*.

The three sources referred to are the *Ius Civile*, the *Ius Gentium*, and the *Ius Naturale*. This threefold division is based on a distinction (of no practical value) taken from the writings of Ulpian, between the *Ius Gentium* and the *Ius Naturale*.

**23. Distinguish *Ius Civile*, *Ius Naturale*, *Ius Gentium*. In what different senses was *Ius Civile* used, and to what extent was *Ius Naturale* identified with *Ius Gentium*.**

***Ius Civile***, as opposed to *Ius Naturale* and *Ius Gentium*, means that portion of Roman Law which was based on ancient usages and early statutes (more especially the XII. Tables), and which was confined in its operation to those who had the privileges of Roman citizenship.

***Ius Naturale*** was the outcome of philosophical speculation in the later Republic and early Empire, and was supposed to be the source from which those rules which were universally applicable, *i.e.*, to citizens and non-citizens, were drawn.

***Ius Gentium*** was that portion of Roman Law which was applicable to both citizens and non-citizens alike. It was practically synonymous with *Ius Naturale*, and was so treated by the Roman lawyers, except on a few points (*e.g.*, the institution of slavery) of merely speculative interest.

**Meanings of *Ius Civile*.**---(a) The law of any particular state; (b) the law of Rome; (c) so much of the Roman Law as was available only to citizens of Rome in contradistinction to that part of the Roman Law which was available to citizens and non-citizens; (d) the whole body of Roman Law including the older *Ius Civile* and the *Ius Gentium*.

The *Ius Naturale* and the *Ius Gentium* were practically identical (see above). The only real difference was in the conceptions on which they were respectively based. *Ius Naturale* was the outcome of philosophical speculation based on the idea of a system of law universally binding. *Ius Gentium* was a system of rules developed from the practical necessity of regulating the intercourse of citizens with non-citizens, or of non-citizens *inter se*, and subsequently adopted as part of the law governing the relations of citizens *inter se*.

24. Explain the origin and characteristics of *Ius Honorarium*. How is it distinguished from *Ius Gentium*?

(*Ius honorarium* was the name given to the body of law promulgated in the edicts of the magistrates (*qui honores gerunt*), of which the chief were those of the Prætor and the Curule Ædile. It originated in the power possessed by all the higher magistrates at Rome, by virtue of the *imperium* with which they were invested on taking office, of issuing general regulations with reference to matters coming within their jurisdiction. It was largely composed of rules derived from the *ius gentium*, but included also rules connected with the administration of the strict *ius civile*, and so is in one respect more extensive than the *ius gentium*. On the other hand, many of the rules of the *ius gentium* were introduced into Roman Law through other media, e.g., legislation; consequently the *ius honorarium* is, in another respect less extensive than the *ius gentium*. The characteristics of the *ius honorarium* as opposed to the *ius civile* (in the strict sense) were that its rules were for the most part applicable to non-citizens as well as citizens; and that, even where applicable to citizens only, as in the case of *dominium in bonis*, and the prætorian testament, it was free from the rigid formalism of the earlier system.)

25. Compare the various kinds of statute law mentioned in the Institutes in respect of (i) subject matter; (ii) period; (iii) legislative authority.

I. **Leges Curiatæ**: these clothed the magistrate with the *imperium* (*leges regię*) and probably dealt with the *sacra* and matters relating to families and testaments. They were enacted by the *comitia curiata* during the period of the Kings.

II. **Leges or Populiscitæ**: relating to public matters, war and peace, and the constitution. They were enacted by the *comitia centuriata* or (in later times) by the *comitia tributa*, chiefly during the continuance of the Republic.

III. **Plebiscita** : dealing with domestic matters and private law generally. They were passed by the *concilium plebis*, during the Republic.

IV. **Senatusconsulta** : the Senate claimed independent legislative powers even during the Republic, but its enactments during that period were mainly confined to public matters, in which it interfered in cases of necessity ; during the early empire, the *comitia* ceased to meet, and legislation relating to both public and private law was referred to the Senate and took the form of *senatusconsulta*.

26. "*Constat autem ius nostrum aut ex scripto aut ex non scripto.*" Enumerate the various sources of Roman Law that come under these heads respectively.

27. Define and distinguish *Ius Scriptum*, *Ius Non Scriptum*, giving examples of each. Of what elements was *Ius Scriptum* composed ?

**Ius scriptum** was that part of the law which at its creation was put into writing, *e.g.*, *leges*, *edicta*. All other law was **non scriptum** or unwritten, *e.g.*, customary law. **Ius scriptum** consisted of : *leges*, *plebiscita*, *senatusconsulta*, *constitutiones principum*, *edicta magistratuum*, *responsa prudentium*.

28. "*Scriptum Ius est Leges, Plebiscita, Senatusconsulta, Principum Placita, Magistratum Edicta, Responsa Prudentium.*" Give the definition of each of these heads.

**Leges**, or statutes, were those which were passed by the Roman people assembled in the *comitia centuriata* or *comitia tributa* on the proposition of a senatorial magistrate, *e.g.*, a consul. **Plebiscita**, were laws passed by the *plebs* on the proposition of a plebeian magistrate, *e.g.*, a tribune. **Senatusconsulta** were enactments of the senate. **Principum placita** or **constitutiones principum** were the legislative enactments or decisions of the Emperors. **Magistratum edicta** were the edicts or rules promulgated by the magistrates who had power to issue edicts,

e.g., the prætors and ædiles. **Responsa prudentium** were the answers of the learned, that is, the opinions of the jurisconsults given in answer to queries put by their clients on doubtful points of law or referred to them by the judges.

29. Show in a tabular form the arrangement of legal topics in the *Institutes of Justinian*.

Book I.—(1) Definitions and divisions of law. (2) The Law relating to Persons: (a) Freeborn, Slaves and Freedmen: (b) *Patria Potestas*: arising from Marriage and Adoption; (c) *Tutela* and *Cura*.

Book II.—(1) The Law relating to Things: (a) Divisions of Things: Corporeal and Incorporeal, the latter being Servitudes; (b) Modes of Acquisition: *iure naturali* (*occupatio, traditio, accessio, specificatio*): *iure civili* (*usucapio, donatio*). (2) Inheritance, being a mode of acquisition of a *universitas rerum*: (a) Wills; (b) Legacies and *Fideicommissa*; (c) Codicils.

Book III.—(1) Intestate succession (also a mode of acquisition of a *universitas rerum*). (2) Obligations: (a) Contracts; (b) Quasi-contracts.

Book IV.—(1) Obligations (continued): (a) Delicts; (b) Quasi-delicts. (2) Actions. (3) Public Offences.

30. “*Omne autem ius quo utimur vel ad personas pertinet, vel ad res, vel ad actiones.*” Translate and explain.

“All law which is in use by us relates either to persons, or to things, or to actions.” This is the threefold division of the subject according to the *Institutes*. They deal, first, with persons as the subject of legal rights, i.e., with the question of legal capacity; next, with things and obligations as the objects of legal rights; and, lastly, with the means of enforcing legal rights. But this division of the subject is not logically adhered to, and has given rise to a great deal of discussion as to what was really intended by it. (See Introductions to Books I. and II. in Moyle.)

## II.—LAW RELATING TO PERSONS.

SANDARS.—Book I.

MOYLE.—Notes to I., 3.2—5; 5; 8.1; 9 pr.;  
10 pr.; 11.1—3; 12.6; 13 pr.; 23 pr. and 3.

MUIRHEAD.—Sec. 9.

POSTE.—Notes to I. 161 and III., 146.

SOHM.—Book I.; and Book III., Chapter I.

GIRARD.—Book II., Chapter V.

MAINE.—Chapter V.

## 1. SLAVERY.

**31.** *What was meant by Capitis Deminutio? Describe and illustrate its various forms.*

**32.** *How was Capitis Deminutio effected? What was its result?*

**Caput** “came to mean primarily a person whom the law regarded as capable of having rights, and, derivatively, his personality or jural capacity, passive and active, in public and private life (Muirhead, 126). Jural capacity was considered under three heads (**tria capita**): (a) *Libertas* (freedom), (b) *Civitas* (citizenship), (c) *Familia* (family rights). **Capitis deminutio** was loss of the rights arising under any of these heads. There were three forms of *capitis deminutio*, viz.: (i) *Maxima*, by loss of liberty in any of the ways in which a freeman might be made a slave. With loss of freedom went all lesser rights. (ii) *Media*, by retaining liberty but losing citizenship and family: (a) by becoming a Latin colonist; (b) by banishment; (c) by deportation as a punishment. (iii) *Minima*, by loss of family rights merely, liberty and citizenship being retained. This happened where a person *sui iuris*

was adopted, or a person *alieni iuris* became *sui iuris*. It was effected by any destruction of the *potestas*, whether by adoption, co-emption, noxal surrender, or emancipation.

The results of *c. d.* would vary with its character. *U. d. minima* (or *mutatio familiæ*) would deprive the person suffering it of all the rights which he formerly possessed as a member of the family he left. If he had been the head of a family and passed into the power of another, he lost the rights of property and of testation which he formerly possessed, and acquired only such as a *filiusfamilias* might possess. If he passed from his natural family to another he lost his rights as *suns heres* of his natural family, and therefore was unable to succeed to its head on intestacy, or to require that he should be instituted his heir or disinherited by name. Similarly, also, where being *alieni iuris* he became *sui iuris*. By *c. d. media* he would lose the civil and political rights of a Roman citizen. He would no longer have the *ius suffragii*, or right of voting; the *ius honorum*, or right of holding offices; the *commercium*, or rights of property or of making contracts as a citizen; and the *connubium*, or right of entering into a legal marriage. If already legally married his marriage would have become dissolved, because only a citizen could contract *iustæ nuptiæ*. By *c. d. maxima*, the citizen or alien became a slave, and thereby lost all the rights available to a free man.

The effect of a citizen being kept in captivity by an enemy did not destroy his rights as a Roman citizen, but merely suspended them, and on his return he was by the *ius postliminii* restored to his former position.

**33.** Give an account of the gradual amelioration of the condition of slaves as regards (i) person; (ii) property.

To what extent is a slave recognised in the Institutes as a person?

(i) In respect of their persons. (Originally the master had power of life and death. The *lex Cornelia de sicariis*

(B.C. 82) made it homicide to kill the slave of another.) The *lex Petronia* (B.C. 61) required permission from a magistrate before exposing a slave to wild beasts. *Claudius* (A.D. 41) forbade the killing of slaves when sick. *Hadrian* required the sanction of a magistrate before inflicting death. *Antoninus Pius* enacted that slaves who had fled for protection to the temples on account of the cruelty of their masters should be sold and not restored to their masters. He also made it homicide for a master to kill his own slave. *Constantine* and *Justinian* allowed moderate chastisement only.

(ii) *In respect of their property.* A slave had no rights of property. All he acquired became his master's, but he was protected by custom in the enjoyment of his *peculium* or private acquisitions, and under the Prætorian Law could contract so as to give third parties rights over the *peculium* available against the master.

*Persona*, in Roman Law, in the strict sense of the word, means a human being invested with or capable of *legal rights*, i.e., having one or more of the *tria capita*. Hence a slave was never regarded as a person, although occasionally the Roman writers use the word in a more extended sense as equivalent to *homo*, e.g., *Gaius* 48—52, followed by *Justinian* in l. 8 pr. Except in a few ambiguous passages, such as the foregoing, the slave is uniformly treated as a subject of property, a chattel, incapable of legal right, although as a human being he differed from inanimate objects in that he might acquire or be subject to natural obligations.

**34.** *What methods of manumission were in use among the Romans? What, at different periods in Roman legal history, was the effect of an informal manumission?*

Originally, the regular methods of effecting valid and formal manumission (*legitima manumissio*) were :

(i) **Censu**, by entering the slave's name in the census as a freeman.

(ii) **Testamento**, by granting freedom by will.

(iii) **Per vindictam**, by a formal act in the presence of the prætor. This was a fictitious suit in which a person, termed *assertor libertatis*, claimed the slave as free against the master by touching him on the head with a wand (*vindicta*) as a symbol of ownership. The master signified his assent by turning the slave round and letting him go, and the magistrate thereupon declared him free.

In all these cases it was essential that the master should have the quiritary ownership of the slave. The **Lex Ælia Sentia** imposed a further essential that the owner must be twenty and the slave thirty, or else that the ceremony must be *per vindictam*, after giving a satisfactory reason for the manumission to a council appointed for the purpose.

Beyond the above methods there were numerous irregular or informal modes of manumitting slaves, e.g., *per epistolam*, by letter; *inter amicos*, by acknowledgment before one's friends; *in ecclesiis*, by announcing his freedom in the church; and in the time of Justinian any clearly expressed intention was sufficient to grant freedom.

**Effects of informal manumission.**—Originally any manumission that was not *legitima* had no effect in law. The master might treat the slave as a freedman, but at death the master's heir might claim the freedman as a slave. Subsequently the prætor protected the informally manumitted, and he was called *prætoris tuitione liber*;<sup>\*</sup> but on his death the master could claim the slave's property. In short, the prætor secured him his personal freedom, but gave him no proprietary rights.

In 19 A.D. the **lex Iunia Norbana** made those whose manumission was defective or informal *Latini Iuniani*, possessing the limited rights of *Latini Coloniarii*. They could not vote or fill public offices, and they had not the *connubium*. They could not make a will or take under a will (except by *fideicommissa*), and at their death the

manumittor took their property as if they were slaves. They could, however, in many ways attain to citizenship.

Long before Justinian citizenship had been granted by Caracalla to all the subjects of the Emperor, and Justinian enacted that all manumission should result in conferring citizenship; so that he abolished the differences in the methods of manumission and in the classes of freedmen.

**35.** *State the provisions of the Lex Ælia Sentia, the Lex Iunia Norbana, and the Lex Fufia Caninia. Which of the former were retained by Justinian and with what modifications?*

The **lex Ælia Sentia** (A.D. 4) (a) required for complete manumission that the slave should be thirty, and the master twenty years old, or, if not, that the ceremony should be *per vindictam* after good reasons for the manumission had been shown to the *consilium*; (b) it ranked as *dedicti*, those, who prior to manumission, had been guilty of great crimes, and their disabilities were perpetual; (c) it restrained manumission in fraud of creditors. The **lex Iunia Norbana** (see 34). The **lex Fufia Caninia** (A.D. 8) prohibited the manumission *by will* of more than a certain proportion of the testator's slaves. Justinian retained the provisions of the *lex Ælia Sentia* as to age, but modified them by reducing the age limit of the master to eighteen, and, subsequently, by allowing a master to manumit by will as soon as he was capable of executing one. He abolished all distinctions between classes of freedmen, and also abolished the *lex Fufia Caninia*.

**36.** "*Non tamen cuicumque volenti manumittere licet.*" What are the restrictions here alluded to?

"Yet it is not everyone who wishes to do so that can manumit." The following could not: (a) The person who had mere bonitarian ownership; (b) an insolvent in fraud of his creditors by the *lex Ælia Sentia*; (c) a master under the

age of twenty, except *per vindictam* after good cause for the manumission had been shown *apud concilium*; Justinian subsequently allowed him to manumit by will as soon as he could make a will; (d) the *lex Fufia Caninia* restricted the number of slaves to be manumitted *by will*. Abolished by Justinian.

37. What was the legal position of a freedman in Roman Law? What rights had the patron over the freedman?

38. "*Libertinorum autem status tripartitus antea fuerat.*" What were the distinctions referred to, and when and how were they abolished?

Freedmen were formerly of three classes, namely, Roman citizens; *Latini Iuniani*, created by the *lex Iunia Norbana* (see 34); and *deliticii*, created by the *lex Ælia Sentia* (see 34 and 35). All these distinctions were abolished by Justinian, and a slave upon obtaining his freedom became a Roman citizen. But Justinian retained the **ius patronatus**, or the rights of the patron over the freedman. These were: (1) *Obsequia*. The freedman must respect his patron and could not sue him without the consent of the prætor. He must also support his patron, if necessary. (2) *Operæ*. He must give the stipulated services, but was entitled to time enough in which to earn his own maintenance unless provided by the patron. (3) *Iura in bonis*. The patron had sole rights of succession to the freedman's property if there were no children, and the *libertinus* died intestate; he was entitled to one-third of the property, if the *libertinus* had no children and made a will, where such *libertinus* died leaving property amounting to 100,000 sesterii.

39. What indications are given in the Roman Law of the modification of slavery in the direction of serfdom?

40. The Roman text says: "All men are either free or slaves."

What classes of persons, however, might be described as "midway between freedom and slavery"?

Midway between freedom and slavery in the later Empire was an agricultural class known generally as **coloni**, and sometimes called *rustici*, *inquilini*, or *agricolæ*. These were settled on the estates of the larger landowners, a portion of which they cultivated as tenants at a rent generally payable in kind and fixed by custom. The *coloni* were inseparably attached to the soil (*glebæ adscripti*), could not leave it, and could not be ejected from it, but were sold with it. If they attempted to escape they could be recovered by a real action. There were two classes: *coloni liberi* (*tributarii*, *inquilini*), who were personally free, could acquire property, and were subject to few burdens beyond the payment of a property tax; and *adscriptitii*, or *censiti*, who had no legal proprietary rights, their acquisitions being treated as *peculium*. The position of the latter class was very similar to that of slaves, except for the fixity of tenure which they enjoyed, and probably arose from modifications due to custom in the position of slaves on agricultural estates.

The former class probably arose partly from the policy pursued by the large landowners during the early Empire of settling on their estates a class of free cultivators, recruited from the Provinces, or enfranchised slaves, and partly from the depression of the smaller landowners, who, voluntarily or compulsorily, placed themselves in the same position to some large landowner for the sake of protection.

41. In a modern history of English law it is written concerning the English serf of the 13th century (i.) that he was not deemed to be in a position equivalent to that of the Roman colonus, and (ii.) "A serf's position in relation to all men other than his lord is simple—he is to be treated as a

*free man . . . a blow given to the serf is a wrong to the serf."*

*What was the position of the Roman colonus referred to in (i.)? Would (ii.) be true of the Roman slave?*

(i.) See preceding answer.

(ii.) It would not be true: a slave could not bring an action for such an injury, though his master might do so, provided the injury was such as to amount to an insult to the master.

**42.** *Translate and explain* NATALIBUS NON OFFICIT MANUMISSIO.

"Manumission does not affect the rights of birth." If an *ingenuus*, i.e., freeborn, had been regarded by mistake as a slave (*in servitute fuisse*), and had been manumitted, and then his free birth had been discovered, the manumission did not alter his original condition, and he did not become a *libertinus*, but remained an *ingenuus*.

**43.** *Compare the legal position of persons in mancipio with that of slaves. How was it that there were no persons in mancipio after the time of Justinian?*

**Mancipium**, or bondage, was a form of legal subjection which arose when a *paterfamilias* made a conveyance by mancipation of a free person in his power to another. It differed from slavery in the following respects:

(i.) Bondage was an institution of the *ius civile*; slavery of the *ius gentium*.

(ii.) The master had possession of a slave: he was not regarded as having possession of the bondsman.

(iii.) The status of a person in *mancipio* was relative; he was only a bondsman in respect of his domestic lord; he was free as regards all other persons, and remained a Roman citizen. The status of a slave was absolute; he was a slave even though he had no master for the time being, as where

he had been abandoned. Consequently, becoming a slave involved *maxima capitis deminutio*, while *mancipium* only involved *minima capitis deminutio*.

(iv.) The person in *mancipio* was capable of legal marriage, and his children were Roman citizens. He also had certain personal rights against his superior, *e.g.*, he could sue him for *injuria*.

(v.) The person in *mancipio* on manumission became *ingenuus*—he did not lose his rights arising from free birth ; the manumitted slave became *libertinus*.

*Mancipium* was obsolete in the time of Justinian. In the time of Gaius it arose in cases of *noxæ deditio*, and temporarily in the course of the fictitious processes of emancipation and adoption. Justinian completely altered the methods of emancipation and adoption, and prohibited the noxal surrender of free persons, which, as a matter of fact, had already quite gone out of use (J. IV. 8. 7), so that this class of persons is not found in his time.

## 2. PATRIA POTESTAS.

**44.** Give a short account of the religious constitution of the Roman family, and show its bearing on the nature and exercise of the *Patria Potestas*.

The Roman family was “an association hallowed by religion, and held together, not by might merely, but by conjugal affection, parental piety, and filial reverence. (The purpose of marriage was to rear sons who might perpetuate the house and family *sacra*. . . . The husband was priest in the family, but wife and children alike assisted in its prayers, and took part in the sacrifices to its *lares* and *penates*.” (Muirhead: Rom. Law, 30.) The importance attached to this religious basis of the family—particularly the necessity of perpetuating the family *sacra*—accounted for two institutions in Roman Law, both of which had as

their object the continuance of the family and its religious cult. The first was adoption to supply the failing family, and the second was testamentary succession to maintain the *persona* of the deceased. In the adoption of a person *sui juris* similar considerations operated. This *arrogatio* could originally be effected only in the *comitia calata*, that is, the *comitia curiata* sitting for the despatch of civil business. It was necessary that the College of Pontiffs should give their consent to the change to be effected, because the arrogation destroyed the head of a family, and it was desirable to see that other representatives were left to carry on the ancestral worship. The effect of the religious element in the constitution of the family was to considerably modify the powers given by the civil law to the *paterfamilias*.

The government of the family was regulated by religious rules (*Fas*) probably to a greater degree than by strictly legal rules (*Ius*). The arbitrary exercise of the powers of the *paterfamilias* was restrained, not only by the religious duties owing to the wife and children, as participating in the family *sacra*, but also by the necessity of consulting a family council before taking any step which would involve a serious alteration in the position of a member of the family in regard to the family as a whole (*cf. the conseil de famille* in French Law). The powers of the *paterfamilias* over the property of the family were also limited by like considerations. He was regarded as a trustee, bound to administer it for the common benefit. "What had come to him by descent, the *bona paterna avitague*, he was in a peculiar manner bound to preserve for his children, any squandering of them to their prejudice entitling them to have him deprived of his administration."

**45.** Define Agnation and show its importance in the earlier Roman Law.

"The family in Roman Law means the Agnatic family." Explain and illustrate this statement.

46. State the constitution of the Agnatic family (a) before (b) under Justinian. In what way could a member of such family be freed from Potestas?

**Agnation** was relationship arising from subjection to a common *patria potestas*. Persons were *agnati* who were in the same *potestas*, or would be in the same *potestas*, if a common ancestor were living.

**Cognition** was blood relationship, *i.e.*, relationship existing between persons who trace their descent from a common ancestor or ancestress. This latter is our present day notion of relationship.

If a table of cognatic relationship be taken and its various branches traced until a female is reached and that line be pursued no further, all who remain will be agnates, and hence it is that Justinian describes agnates as "all the cognates who trace their connection exclusively through males," and hence the explanation of the legal maxim "**Mulier est finis familiæ.**"

But this description of Justinian's is not correct or exhaustive, because persons may be *agnati* to each other, though there may be no blood relationship, *e.g.*, a stranger adopted into a family would become an agnate of that family. "The foundation of agnation is not the marriage of father and mother, but the authority of the father. All persons are agnatically connected together who are under the same paternal power, or who have been under it, or who might have been under it if their lineal ancestor had lived long enough to exercise his empire. In truth, in the primitive view, relationship is exactly limited by *patria potestas*. Where the *potestas* begins, kinship begins, and therefore adoptive relatives are among the kindred. Where the *potestas* ends, kinship ends, so that a son emancipated by his father loses all rights of agnation" (Maine, 149).

The class of Agnates, as distinct from the *gens*, does not appear to have received legal recognition during the *regal period*. Their claims, based on plebeian custom (the

plebeians having no *gens*), were probably first recognised by the XII. Tables.

Under Justinian the agnatic family still existed, but the recognition of blood relationship largely modified it. The artificial means of enlarging the family by adoption was altered. Justinian provided that only in the case where the adoptor was an ascendant of the adoptee did the adoptee completely pass into the adoptor's family; in all other cases the adoptee retained his rights in the natural family, and by the adoption obtained only rights of succession *ab intestato* in the new family. This, together with the disappearance of the *manus*, obsolete long before the time of Justinian, made the Roman family similar to our own. The claims of blood relationship were more fully recognized, and in his later reforms Justinian gave to collaterals a right of succession on an intestacy after the descendant, and the ascendants together with brothers and sisters.

The *patria potestas* was dissolved: (a) by death of the *paterfamilias*, (b) the father or son suffering *capitis deminutio*, (c) the son attaining certain dignities, and (d) emancipation.

47. Explain the nature of the *Patria Potestas*, showing what rights it involved and how they were modified.

How did it arise and how was it terminated?

The ***patria potestas*** was the power which the father possessed over the persons and property of his children.

Over the persons of his children the power of the father was originally absolute. He had the power of life and death. Hadrian condemned to banishment a father who killed his son discovered in adultery, and Constantine made the slaying of a son by a father parricide. The ill-treatment of children was restrained by Trajan, who compelled a father to emancipate a son whom he had treated cruelly; and Valentinian forbade the exposure of children. The sale or pledge of children was allowed, but the XII. Tables.

provided that a son became free after a third sale by his father. Diocletian and Maximian forbade the sale and pledging of children. Constantine continued the prohibition but allowed parents in extreme poverty to sell their new-born children. Justinian also allowed this, but punished creditors who took children in pledge. The noxal surrender of children, by which, previously, a father had been able to hand over, in satisfaction, a child who had been guilty of some injury to another, was obsolete in the time of Justinian.

Over their property the power of the father was originally absolute. Everything belonged to him. In the days of Augustus the *peculium castrense*, property acquired in the course of military service, was recognised as belonging to the son as his separate property. Later, the *peculium quasi-castrense*, or property acquired in the exercise of certain public offices and liberal professions, was recognised. In the time of Justinian the son had : (1) *peculium profectitium*, property coming from the father and strictly belonging to the father ; (2) *peculium castrense* and *quasi-castrense* ; (3) *peculium adventitium*, property coming to the son in any other way. Of this the father had the usufruct or a life interest, but the reversion belonged to the son.

The *patria potestas* arose : (1) by birth from a legal marriage (*iustæ nuptiæ*, see 58) ; (2) by legitimation (*legitimatio*, see 48) ; (3) by adoption (*adoptio*, see 52).

It was terminated : (1) by death ; (2) by the father or son suffering *capitis deminutio* ; (3) by the son attaining certain dignities ; (4) by emancipation.

**48.** Describe the methods by which legitimation was effected. How was legitimation per subsequens matrimonium introduced into Roman Law ? Subject to what conditions was it allowed ?

The offspring of persons living in a state of concubinage, a relationship which, although having no legal recognition,

was not condemned by custom, might be made legitimate in one of three ways :

(a) **By oblation to the curia.**—The *curia* here mentioned was the local senate in towns, the members being drawn from the highest rank of inhabitants, called *curiales*. The position was an onerous and expensive one. By becoming members of the *curia* children became legitimate, and acquired rights of succession to the father, but gained no rights as against other members of the family.

(b) **By subsequent marriage.**—This was ~~first allowed by Constantine~~, and was called *legitimatio per subsequens matrimonium*. It was necessary that the woman should be freeborn, and that no children by a lawful wife existed. Justinian required the fulfilment of three conditions: (1) that at the moment of conception the parents should have been capable of a legal marriage; (2) that an instrument settling the *dos* or at least attesting the marriage should be drawn up; (3) that the children should ratify the legitimization.) The foregoing requirements of Constantine were dispensed with.

(c) **By rescript.**—This method was invented to meet the case where subsequent marriage was impossible. Justinian by rescript put the natural children, provided there were no legitimate child, of a deceased mother into the position they would have held had the marriage taken place. This privilege was also extended to the children of a deceased father when he expressed his wish to that effect.

Legitimation by subsequent marriage has never been recognised in English law, and a child born before marriage cannot be made legitimate by this means. But in France and Scotland, where the rule of Canon law is followed, legitimation may be effected by subsequent marriage. The same privilege is found in the Roman Dutch law.

**49.** *What changes in the relations of father and son, as regards property, took place before the reign of Justinian?*

**50.** *What rights did a father enjoy over property acquired by his son in the time of Justinian?*

**51.** *Show in detail what was included within peculium castrense, peculium quasi-castrense, and peculium adventitium respectively.*

Originally a *filiusfamilias* was on the same footing as a slave with regard to property: all he acquired belonged to the *paterfamilias*. The first step towards modifying this harsh rule was to allow him to enjoy his **peculium** to the same extent as the slave, but no advance was made on this during the republic.

The second step was the creation of the **peculium castrense**. By an enactment of Augustus, adopted by subsequent emperors, a soldier *filiusfamilias* was absolutely entitled to whatever he obtained by gift from his parents or relatives for his equipment, or himself acquired on military service.

Thirdly, this privilege was extended to persons engaged in the higher civil offices, and their acquisitions were known as **Peculium quasi-Castrense**. Constantine conferred this privilege on officials attached to the Imperial palace: it was later extended to officials of the Prætorian Prefect, clerks in the Chancery Court, and keepers of records. Later (A.D. 440) to advocates of the Prætorian Court or the Court of the City Prefect; in A.D. 469 to bishops, presbyters and deacons, and to these Justinian added the clergy of every grade. Lastly, the **Peculium Adventitium** was introduced by Constantine, who enacted that a father should have only a life-interest (*ususfructus*) in the property acquired by his children from their mother by her will or on her intestacy. The father was bound to manage it with all care, and could not sell it to a purchaser, so as to give him a title, even by prescription. In 395 A.D. the rule was extended to property coming from the maternal ancestors beyond the mother, and whether by gift *inter vivos* or by will. Similarly,

Theodosius and Valentinian gave only a usufruct to the father in property acquired by a son through his wife, or a daughter through her husband. (In the time of Justinian, the *peculium adventitium* included all acquisitions other than the *peculium castrense* and *peculium quasi-castrense*, and other than those made from the father's property. The son had the *corpus*; the father had the usufruct.)

(A further change effected by Justinian was that on the emancipation of a son the father was to retain the usufruct of one-half the son's *p. adventitium*.) Previously Constantine had allowed the father to retain one-third of the property as owner.

**52.** What was the object of Adoption in early Roman Law? Give a detailed account of the mode of giving a son in adoption (a) in the time of Augustus, (b) in the time of Justinian. Could women adopt?

In what other ways than by Adoption could one person pass into the potestas of another?

**53.** Give an account of the different kinds of Adoption, and show by reference to the primitive restrictions on Adoption the true character of that institution.

**Adoption** was the admission of a person into the family of another, whereby he acquired all the rights of membership and fell under the *patria potestas*. It was called *Arrogatio* when the person adopted was *sui iuris*, and *Adoptio* when the person adopted was *alieni iuris*.

**Object.**—The true object of the system of adoption was to prevent the extinction of the family, with its *sacra*, through fruitless marriage and death. "Adoption imitated nature," so that it was a rule that a younger person could not adopt an older; and the adoptor had to be eighteen years older than the adoptee. So, also, castrati could not adopt, but impotent persons could. Again, women could not adopt, because they could not possess the *patria*

*potestas* : their children would be in the power of the husband. Since the object of adoption was to maintain the religious interests of the family, it was necessary to consider the circumstances when a person was arrogated. By arrogation a family was destroyed because its head (and with him all its dependants) became *alieni iuris*. The extinction of one family must, therefore, not be prevented by extinguishing another ; hence the rule that required the assent of the College of Pontiffs to arrogation. Their consent was only given when there were left brothers of the *arrogatus* to attend to the ancestral worship. (Muirhead : Rom. Law, 29.)

The modes in which a person was adopted depended upon whether the process was arrogation or mere adoption, and also upon the period. They were as follows :

I. **Arrogatio**, or the adoption of a person *sui iuris*, i.e., not in the power of anyone.

Prior to Justinian, *arrogatio* was of a public character and had to be sanctioned by a *lex Curiata*, or later by the thirty lictors who represented the thirty *curiæ*. (The ceremony was so called because the adoptor and the adoptee were asked if they were willing : the people if they ordered it ; and the College of Pontiffs if they objected, because by such adoption a family might cease to exist together with its *sacra*.)

Under Justinian, arrogation was effected by *imperial rescript* on proof : (1) that the adoptor was over sixty, and that he was at least eighteen years older than the adoptee ; (2) that he had no other natural or adopted children.

II. **Adoptio**, or the adoption of a person already in the power of another.

Prior to Justinian, *adoptio* was effected by *mancipatio* and *cessio in iure*. In order that the adoptor should acquire power over the adoptee, it was necessary that the natural father's power should be destroyed. This was done by the natural father selling his son three times (*mancipatio*) : after the third sale, the natural father's power was destroyed by the Law of XII. Tables. The child was then in *mancipio*

to the purchaser, and was claimed by him as a son in the fictional suit of *cessio in iure* before the magistrate, who awarded the child to the adopting father.

Under Justinian, adoption was effected *imperio magistratus*. This was effected by executing a deed drawn up before a superior magistrate, the person giving, and the person given, and the person receiving, into adoption, being present and consenting.

The effect of arrogation was to lessen the number of families because the person arrogated was, until adopted, the head of a family which ceased on his falling *in potestate*. *Adoptio* did not, like *arrogatio*, affect either the status of the adoptee or the number of families.

As above stated, the rule was that women could not adopt because they could not possess the *patria potestas*; but it was the custom of some Emperors to allow women to adopt as a comfort for the loss of their children. Still, under these conditions they did not acquire anything in the nature of *patria potestas*: their adopted children simply stood in the same relation as the woman's natural children would have done.

**54.** *What restrictions (if any) were placed upon the arrogation of a person under the age of puberty?*

An *impubes (sui iuris)* could not until the time of Antoninus Pius be arrogated. That Emperor allowed this to be done under the following conditions: (a) that the arrogation was honourable and advantageous to the *impubes*; (b) that if he died before puberty, his property should go to his natural heirs; (c) that if emancipated or disinherited before puberty all his property should be restored to him, including (if there were no good reason for the emancipation or disinherison) a fourth (**Quarta Antonina**) of the arrogator's goods on the death of the latter; (d) that if the *arrogatus*, on attaining puberty, could show the arrogation was unfavourable, he could claim his property and emancipation. (J. I. 11. 3.)

**55.** *What was the effect under Justinian of Adoptio and Emancipatio on the relation of a son to his natural father?*

**56.** *How did Emancipation affect the interest of a paterfamilias in the property of his filiusfamilias at different periods of Roman legal history?*

**57.** *If at the end of Justinian's reign a father emancipated his son, (1) what formalities would be employed, and (2) what would become of the son's peculium, if he had any?*

**Effect of Adoption.**—When a person *sui iuris* was adopted, he ceased to be *sui iuris* and the head of a family, and became one of the family and subject to the *potestas* of the adoptor. The adoption of a *filiusfamilias* had no effect on his legal status; it was the translation of the adopted from his former family into that of the adoptor. By this means he lost entirely the rights that he possessed as a member of his former family and acquired all the rights of a member of the new family. Justinian altered the effect of this adoption by ordaining that if the child were adopted by a person other than an ascendant, the adoptee retained all his rights in his natural family, but did not acquire any in the new family, except the right of succession. This was called **adoptio minus plena**. If, however, the adoptor were an ascendant, the adoption was full (**adoptio plena**), and the child passed as entirely into the new family as he did under the old law.

**Emancipatio.**—This was the liberating of a child from the *patria potestas*.

It was effected originally by *mancipatio* or *fictitious sale*. After the third sale, the father's power was destroyed and the child was in *mancipio* to the purchaser. In order that the father should have the rights of patronage, and with them the rights of succession, he agreed with the purchaser that the child should be resold to him. The natural father then freed him as he would a slave, and thereby became

his son's patron with the patron's rights.) Subsequently the prætor provided against the fiduciary father acquiring the rights of the patron and, by implying in every such ceremony the agreement to re-sell by the fiduciary father to the natural father, enabled the natural father to be his son's patron by manumitting him. In the same way the natural father became the tutor of the child if under the age of puberty. In the time of Justinian, all this fictitious process was abolished. Children could be emancipated by a simple process before a magistrate, and even an absent child could be so emancipated. All the rights were thereby reserved to the natural father as were given to a patron. If the *emancipatio* were followed by an adoption by an ascendant, the natural father would by the *adoptio plena* lose all rights.

For effect of *emancipatio* on interest of *paterfamilias* in property of *filiusfamilias*: see 50.

### 3. HUSBAND AND WIFE.

58. What was required in Roman Law to constitute a binding marriage?

Consider the result if any condition were not fulfilled.

Briefly indicate the degrees of collateral relationship, natural or otherwise, within which marriage was prohibited at the times of Gaius and Justinian respectively.

Four conditions were necessary to a legal marriage—**Iustæ Nuptiæ.**

I. The parties must be *puberes* (male, 14 years of age; female, 12).

II. The parties must intend to become husband and wife.

III. Their respective *patresfamilias* must give their consent.

IV. The parties must have the *connubium*.

The **connubium** involved the following conditions :

(a) The parties must be Roman citizens or otherwise have capacity to contract a legal marriage (absolute *connubium*) ;

(b) They must not be within the prohibited degrees of relationship. Marriage between persons not having absolute *connubium* was termed **nuptiæ** simply (not *iustæ nuptiæ*). It was gentile marriage (*iure gentium*).

Marriage was **forbidden**—

(a) On grounds of public policy, between senators and freedwomen (a restriction abolished by Justinian), the governor of a province and a native of that province, guardian and ward, Jew and Christian, and in a few other cases.

(b) On the ground of relationship, between ascendants and descendants by blood or adoption, and between collaterals, if related within certain degrees (see *infra*).

If the conditions necessary for marriage, either civil (*iustæ*) or gentile (*iure gentium*), were not fulfilled, the union came under the head of **stuprum** (i.e., an illicit connection), and the children would be *spurii*, and the *dos* and marriage gift were liable to confiscation. **Bigamy** and incest were severely punished.

*Collateral relationship*.—Originally marriage was forbidden between collaterals up to the sixth degree. Subsequently the prohibition was reduced to the fourth degree, i.e., to the intermarriage of first cousins. Finally, it was further reduced to the third degree, with this restriction, that if one of the collaterals was only removed by one degree from the common ancestor he was regarded as a quasi-ascendant and incapable of intermarriage at any degree, e.g., a man could not marry his brother's or sister's granddaughter, though only related in the fourth degree (*Poste*).

### 59. How was marriage celebrated and how dissolved ?

In early times marriage was celebrated in three ways :

I. By **Confarreatio**, a religious ceremony peculiar to patricians, whereby the wife passed into the power (**Manus**)

of her husband, taking practically the legal position of a daughter.

II. By **Coemptio**, an adaptation of the ancient ceremony of **Mancipatio**. This also had the effect of placing the wife *in manu*.

III. By **Usus**.—This was a lower form of civil marriage requiring no particular ceremony. The husband acquired *manus* over the wife after cohabitation for a year, unless she interrupted his possession by absenting herself from his house for three nights in the year, and so breaking the continuity of the *usus* (**usurpatio**). This was provided by the Law of the XII. Tables, and was based on the principles governing *usucapio* (see 122—124).

(These three forms of marriage fell into disuse, and were gradually superseded by a “fashion of wedlock”—old apparently, but not hitherto considered reputable—which was founded on a modification of the lower form of civil marriage” (Maine). It amounted merely to a delivery of the woman to the man, with the intention of becoming husband and wife. The rights of their respective families were undisturbed, and the wife remained in the power of her father and did not pass *in manum*.)

The dissolution of marriage is dealt with in 60.

60. *Sir Henry Maine says, concerning the Roman marriage-tie of the early Empire, that it was “the laxest the western world has seen.” What did he mean? What steps were taken by the Christian Emperors to alter the state of things to which Sir Henry Maine alludes?*

*Compare Roman and English Law with regard to the conditions of a valid divorce.*

Maine refers here to the ease with which the marriage tie might be dissolved. The methods by which divorce could be effected were :

I. Where a wife did not pass *in manum* she remained in the power of her father, and in the exercise of such power

the father could take back his daughter against the wishes of both her and her husband. Antoninus Pius prohibited this, and Marcus Aurelius qualified it by the words "unless for very weighty reasons."

II. Mutual consent was sufficient to divorce the parties, and the State offered no interference until Justinian prohibited it except in three cases: (a) When the husband was impotent; (b) when either party wished to enter a monastery; (c) when either was in captivity for a certain length of time. Later, penalties were added. Persons dissolving marriage by mutual consent forfeited their property, and were confined for life in a monastery, which took one-third of the property, the remaining two-thirds going to the children of the marriage. Justinian's successor repealed these prohibitions.

III. Divorce might be effected by either party without the consent of the other. Before the *lex Julia de adulteriis*, no special form was required. But this law required a *libellus repulii* to be delivered by a freedman in the presence of seven Roman citizens above the age of puberty. The written record of the marriage was destroyed and the divorce publicly registered.

*Restraints on this divorce.*—A wife *in manu* could not divorce her husband; if he divorced her she could compel him to release her from his *manus*.

The *lex Julia* gave an innocent party certain claims on the property of the guilty party.

Constantine allowed divorce for certain heinous offences and punished divorce for other causes by forfeitures of property.

Theodosius and Valentinian allowed divorce for a number of serious offences against law and morality, otherwise forfeitures were inflicted.

Justinian repealed all former constitutions. He allowed a wife to divorce her husband on certain grounds such as treason and immorality, and she thereupon received her

dowry and her husband's portion (*donatio propter nuptias*) for life, with the reversion of it to her children, or to herself if no children. Divorce on other grounds was punished by forfeiture of her dowry and a prohibition against her remarrying for five years.

A wife might be divorced for similar reasons, forfeiting her dowry if there were no children, or if there were, the husband held the dowry for his life, and the reversion went to the children. If divorced for other reasons the husband forfeited the dowry and *donatio propter nuptias* (Hunter).

**Roman and English Divorce.**—The former has already been described. In England divorce can only be decreed by the courts. Husbands and wives may agree to separate, but the marriage-tie remains. The laws of divorce are very stringent and unequal. A husband can obtain divorce from his wife for her adultery, but the adultery of a husband is no ground for divorce by the wife, unless accompanied by desertion or cruelty on the part of the husband. Marriages may be annulled by the court on the ground of impotence on either side.

**61. Define Nuptiæ.** What was the relation of Nuptiæ to Manus? State the conditions that had to be fulfilled before the bond of nuptiæ could be contracted.

How did the position of a married woman vary according as she was in the manus of her husband or not?

**Nuptiæ**, sometimes called **Matrimonium**, as distinguished from *iustæ nuptiæ*, *iustum matrimonium*, was marriage between persons who had not the connubium, and who could not therefore contract a valid marriage by civil law. *Nuptiæ* was, however, recognised by Gentile Law as a lawful and honourable union, inferior only to *iustæ nuptiæ*, in that it did not create *patria potestas*, but the issue were legitimate as opposed to natural children.

With the exception of the *connubium*, all the requirements to effect a civil marriage were necessary to create *nuptiæ*.

**Manus** was the term applied to the rights which a husband possessed over the wife when marriage was contracted in certain ways and under certain conditions (see 59). *Nuptiæ* was a necessary condition to the acquisition of, but did not necessarily confer, *manus*.

*Manus* only resulted where *nuptiæ* was accompanied by the conditions before referred to.

If a wife were *in manu* she became practically in the legal position of a daughter in her husband's family, and all her property and all her power of dealing with it passed to her husband or to the *paterfamilias* in whose power he was. A wife *in manu* was called *materfamilias*.

If not *in manu* the wife, called *matrona*, did not pass into her husband's family, but remained in her own. She had, after marriage, the same capacity to acquire as she had before marriage; and the property she possessed or subsequently acquired, did not belong to her husband; subject, however, to the provisions of the marriage contract. Nor in the absence of *dos* had the wife any claim to maintenance by her husband.

**62.** *State the rules for determining the legal condition of children born of parents of unequal status.*

A child born of a legal marriage (*iustæ nuptiæ*) followed the status of the father at the time of conception. A child born out of civil wedlock followed the status of the mother at the time of birth. This latter part of the rule was by the time of Gaius modified in favour of liberty, and if the mother was free at any time between conception and birth, the child was regarded as free. The same rule applied to the offspring of a *Latina Iuniana* and a Roman citizen, or of a *Latinus Iunianus* and a female citizen (G. I. 79, 80).

In the case of a gentile marriage, by the **Lex Minicia** (of uncertain date) the offspring were to follow the condition of the parent of lower status, but, as stated above, this did not apply to the issue of marriages of *Latini*(æ) *Iuniani*(æ) with citizens.

63. *Did marriage cause any legal disability in either husband or wife, or entitle either to rights in the property of the other?*

Marriage in later times did not produce any proprietary disability in the case of either husband or wife, or confer on either rights in the property of the other *inter vivos*, unless such property were settled by way of *dos* or *donatio propter nuptias*. It gave, however, a right of succession on intestacy, in default of cognate relations.

Gifts between husband and wife, except by way of marriage settlement and small occasional presents, were invalid.

In the earlier law a wife who came *in manum* was subject to all the disabilities, but also had the rights of succession, of a person under power.

64. *Distinguish Manus from Patria Potestas and Mancipium. What was the legal position of a married woman in the time of Justinian?*

**Manus** was the power of the husband over his wife, and originally was legally unrestricted. **Patria potestas** was the power of the father over the children of the family, and was, also, originally unlimited. **Mancipium** was the power acquired over a free person who had been sold, or had sold himself, to another by the ceremony of *mancipatio*. Such a person, also called *mancipium*, became *in loco servi*; but he was not a slave, and any insult or injury done to him by the holder might result in an *actio iniuriarum* by the person who gave the *mancipium*. The *mancipium* was released by the same modes as a slave was manumitted, but none of the statutes relating to manumission applied.

In the time of Justinian a married woman never was *in manu*: she did not enter the family of her husband, but was only allied to it. She remained in her father's family, who compounded with the husband for his liability to maintain his daughter by giving a *dos* with her. Beyond

this *dos* the husband possessed no rights over his wife's property, whether acquired prior or subsequent to the marriage. The husband could not sue or be sued in respect of contracts made by the wife. Husband and wife had merely an ultimate right of succession to each other in default of blood relations (*cognate*).

65. *Give an account of the Roman Law as to Dos; and say what, at different periods, were the relations of husband and wife as regards property.*

The institution of the **dos** was of great antiquity, and its early history cannot be traced with certainty. It was the dowry or property contributed by the wife, or some one on her behalf, towards the expenses of the marriage. Some writers regard it, when given by the wife's father, as a kind of composition to satisfy his liability to maintain his daughter—a liability which her marriage did not destroy. At first the husband was regarded as owner of the *dos* during the marriage, although he was usually bound to restore it or its value on dissolution thereof. His rights, however, were gradually restricted. He was allowed to alienate or mortgage dotal property until the *lex Julia* prohibited the alienation of lands in Italy belonging to the *dos* without her consent, or the mortgage thereof even with her consent. Justinian prohibited alienation either by sale or mortgage of immovables belonging to the *dos* wherever situated, and whether the wife consented or not.

The husband was bound to take the same care of the dotal property as he did of his own, *i.e.*, he was liable for *culpa levis in concreto*, but was not liable for accidental loss. Things fungible and things taken at a valuation (*res æstimate*) became his property and were at his risk, the obligation being to return them in kind or money; other things had to be returned in specie. He was entitled to the fruits and income of all kinds of dotal property, and

could claim reimbursement for necessary expenses. On the death of the wife or the dissolution of the marriage, he had to restore the *dos* to the wife or her heirs, or, in the case of *dos profectitia* or *dos receptitia* to the settlor. (See 67.)

For the relations of husband and wife as regards property : see 63.

66. *What were the husband's rights and duties in reference to dos? What do you know of the importance of the Roman institution of dos in general legal history?* (See 65.)

The importance of *dos* in legal history lies in the fact, that the institution, together with many of the rules of Roman Law regarding it, has descended to those modern systems of law which are founded on Roman Law, *e.g.*, that of France. (See, by way of illustration, 69.)

67. *State the principal kinds of Dos and the rules applicable to each.*

**Dos** was of three kinds :

I. **Dos profectitia**, when given by a male paternal ancestor.

II. **Dos adventitia**, when given by the wife herself or by any other than a male paternal ancestor.

III. **Dos receptitia**, when given with a stipulation that it should revert to the donor on the dissolution of the marriage.

The following rules regulated the **devolution of the dos** :

(a) *On the death of the husband.*

*Receptitia* went according to the agreement on which it was given.

*Profectitia* and *Adventitia* reverted to the wife if *sui iuris*, or to the wife's father if she were in his power.

(b) *On the death of the wife.*

*Receptitia* went according to the agreement.

*Profectitia* reverted to the donor, if surviving, subject to a right to retain one-fifth in respect of each child of the marriage. If the donor were not surviving the husband took.

*Adventitia* went to the husband.

Justinian altered these rules by depriving the husband of the *dos*, and giving it to the heirs of the wife without any deductions for the children.

(c) *On divorce.*

*Receptitia* went according to agreement.

*Profectitia* and *Adventitia* reverted to the wife, or to her father if she were in his power; unless the wife were guilty of misconduct, in which case the husband might retain the *dos*—absolutely if there were no children; for life, if there were.

In Justinian's time, therefore, the husband had, in general, only a life interest in the *dos*, and lost it entirely on the death of the wife or dissolution of the marriage (except in the case of divorce through the wife's misconduct).

**68.** *What provision for sustaining the matrimonial expenses was made (a) on the wife's side, (b) on the husband's side, at any period of Roman legal history?*

The wife's contribution to the matrimonial expenses was the *dos*: that of the husband was known as the **donatio ante nuptias**. This was a settlement before marriage by the husband on the wife as his contribution to the expenses of the marriage. It was governed by the same rules as the *dos*, and, like the *dos*, was protected against the claims of creditors. Justin allowed the *donatio ante nuptias* to be increased during the marriage, and Justinian allowed a

settlement by the husband to be made during the marriage, hence the change of name from *donatio ante nuptias* to **donatio propter nuptias**. (J. II. 7, 3.)

**69.** Compare Roman Law with the following statements upon French Law :—

“Dowry . . . is the property which the wife brings to the husband to bear the household expenses” (Cod. Civ. section 1540.)

“The husband has the sole management of the dotal property during the marriage” (*ibid.*, section 1549).

“Real estate given as dowry cannot be conveyed or mortgaged during the marriage” (*ibid.*, section 1554).

“If the dowry consists in real estate . . . the husband or his heirs may be compelled to return it immediately after the dissolution of the marriage. If it consists in a sum of money . . . the restitution can only be compelled one year after the dissolution” (*ibid.*, sections 1564, 1565).

All these statements of French law are reproductions of the Roman Law relating to the *dos* in the time of Justinian.

Originally, however, the *dos* probably became the absolute property of the husband, subject only to an obligation to return its value on the termination of the marriage. The *Lex Iulia de fundo dotali* forbade the sale of landed property in Italy belonging to the *dos*, without the wife's consent, or the mortgaging of it even with her consent. Justinian extended the provision and forbade the alienation of dotal land wherever situate, either by way of sale or mortgage. Previously to Justinian's legislation, the husband (in the absence of special agreement) had been allowed to return fungible things belonging to the *dos* by three instalments in successive years.

**70.** Compare English and Roman Law with reference to the relation of husband and wife.

(1) In English Law, the husband is bound to maintain his wife, and the wife is also liable to maintain her pauper

husband if she be able; whilst in Roman Law neither was under any obligation to support the other. (2) In Rome, the husband was not liable on his wife's contracts, whereas in England he may be, and his wife has generally an implied authority to pledge his credit for necessities. (3) Gifts between husband and wife were forbidden in Roman Law, and were recoverable by the donor during his or her lifetime; English Law now permits such gifts. (4) The marriage settlement in England provides for the children, but no such provision was made in Rome. (5) Marriage cannot be dissolved by the mutual consent of the parties in English Law, but can only be dissolved by the Courts after strict proof of certain misconduct by the one against whom the divorce is sought. In Rome, marriage might be dissolved by mutual consent, and even by the desire of one party, but in this latter case, it was subject to restrictions in later law.

#### IV.—TUTORS AND CURATORS.

71. *Describe the Roman system of guardianship.*

72. *In what cases, and for what purposes, were a tutor and curator respectively appointed?*

In Roman Law, two kinds of guardianship were recognised: (1) **Tutela**, which occurred in two cases, (a) *Tutela impuberum*, and (b) *Tutela mulierum*; and (2) **Cura**, of which there were three cases: (a) *Cura minorum*; (b) *Cura prodigi*; and (c) *Cura furiosi*.

The essence of *tutela* consisted in the **auctoritatis interpositio**, the enabling the ward to perform acts valid in law. The tutor's "authority" consisted in his actively co-operating in the act, so as to augment and fill up the legal personality of the ward (*augere, auctor fieri*), and so complete his legal capacity; hence it could be given neither before nor after the act, nor by an agent. The *auctoritas* might

be accompanied by the right of *gestio*, i.e., the management and disposition of the property of the ward, but this was not essential; for instance, it was not involved in the tutelage of women.

The right of *gestio*, on the other hand, was essential to *cura*. The object of *cura* was to exclude persons deemed incapable of managing their property from such management. But the *curator* had no *auctoritatis interpositio*. He had no power to supplement imperfect legal capacity in the ward.

*Guardianship of Impuberes—Tutela impuberum.*—In the case of persons below the age of puberty, tutors were appointed to manage the pupil's property, and to supply what was wanting in the pupil's legal capacity. A tutor was necessary although the pupil had no property to be managed, because, without a tutor, the pupil could not enter into contracts or perform other legal acts. There were two periods in this tutelage: (a) up to seven years of age, the child was called *infans*. At this time he could not take part in any legal act: he had neither *intellectus* nor *judicium*. All transactions affecting him or his property were carried out in the name of the tutor; (b) from seven to fourteen years of age the child was *pubertati proximus*. Here the child had *intellectus* but not *judicium*: the child acted in his own name, but the sanction (*auctoritas*) of the tutor was necessary to complete the pupil's legal capacity and make the transaction effectual.

*Guardianship of women—Tutela mulierum.*—Under the earlier law women were under perpetual tutelage. But, in the case of women of full age, the powers of the tutor were at an early period limited to the *auctoritas interpositio*, and did not include the *gestio*. By degrees even this was reduced to a mere form. Thus, a woman was allowed to deal with *res nec mancipi*, and bind herself in any transaction not governed by the strict *ius civile* without the tutor's authority. Again, a woman could acquire the power

to make a will by a fictitious *cæemptio* followed by remancipation and manumission, by which she obtained a *fiduciary tutor* who was bound to give his formal sanction to the will. The *Lex Papia Poppæa* (A.D. 9) exempted women having the *ius liberorum* from tutelage. Claudius abolished the *legitima tutela* of the agnates over women. Hadrian allowed women to make wills without going through the ceremony of *cæemptio*, and made it compulsory on a tutor to give his *auctoritas*, unless such tutor were a parent or patron. It was not until after the reign of Diocletian that the guardianship of women entirely disappeared.

*Guardianship of other persons—Cura.*—The third class of persons over whom guardianship was exercised were those above the age of puberty, but who, from some particular or accidental cause, were not deemed capable of exercising or protecting their rights and property. Such persons were *adolescentes* (those between the age of puberty and *perfecta ætas*, i.e., twenty-five), insane persons, prodigals, and deaf mutes. The guardian appointed over such persons was called a **curator**. A curator might also be appointed for special purposes, e.g., to conduct a law suit; to fill the place of a tutor who had become unfit, or to act conjointly with a tutor who was not fit to manage the affairs of the pupil. Originally no protection was accorded to persons over the age of puberty, until the **lex Plætoria** rendered persons found guilty of overreaching them liable to criminal prosecution and infamy. Subsequently, the prætor provided a remedy by restoring to his former position (*restitutio in integrum*) any person under twenty-five who entered into a transaction detrimental to his interests. Finally, Marcus Aurelius directed curators to be appointed, without inquiry, whenever applied for.

### 73. Distinguish and compare Tutela and Cura.

**Tutela** was the guardianship exercised over a free person on account of his being below the age of puberty. The

object of the appointment of such guardian was, not so much to control his property as, to supply what was defective in the pupil's legal capacity so as to enable him to perform legal acts. **Cura** was the guardianship exercised over a free person above the age of puberty who, owing to some cause or other, was incapable of looking after his affairs, e.g., an insane person or a person under twenty-five years of age. A *curator* might be appointed to act generally, or his appointment, unlike that of the *tutor*, might be confined to a particular occasion or purpose. The duty of the curator was to manage the property of the ward and to assist and protect him in the transaction of business. In later times the duties of a general *curator* were practically the same as those of a *tutor*; both were charged with the care of the person as well as the property of the ward. There remained only the technical distinction that the curator's functions did not include the *auctoritas interpositio*.

**74.** State and explain the terms of the definition of *Tutela* given in the *Institutes*.

"**Tutela** is the authority and power given and allowed by the civil law over a free person for the purpose of protecting one who on account of his age is unable to protect himself" (J. I. 13, 1). The law allowed (*permissa*) a *paterfamilias* to appoint a tutor for his child and almost invariably confirmed the appointment. Failing such appointment the law gave (*data*) the infant a tutor, either by imposing the office on the nearest agnate, or, in Justinian's time, the next-of-kin, or by a special appointment being made by a magistrate. The tutor was only appointed when the free person had no protection, so that such person must be *sui juris*; because otherwise he would be under the protection of his *paterfamilias*. The protection extended not only to the pupil's property but also to all his judicial or other business transactions, the tutor supplementing his imperfect legal capacity.

**75.** *What were the duties of the tutor? Were they identical with those of an English guardian?*

(See 71 and 77.)

These duties were not the same as those of an English guardian. The latter has the custody, maintenance, and education of his ward. In Rome, the mother, if no one were appointed by the father for this special purpose, had the custody of the child, and the prætor fixed the amount required for maintenance. The tutor's duty was to provide the funds for this purpose out of the property of the pupil

**76.** *State accurately the several cases in which—*

- (a) *A tutor could act for his pupil ;*
- (b) *A pupil could act without his tutor ;*
- (c) *The concurrence of both was necessary.*

(a) A tutor could act for his pupil when the latter was under the age of seven years. Up to that age the tutor represented the pupil and had sole management of his affairs.

(b) From seven to fourteen years of age, the pupil could act without his tutor in transactions involving the acquisition of some right or benefit without any liability being incurred, *e.g.*, he could accept a legacy, for that could only be for his benefit.

(c) But where the transaction involved the alienation of property by, or the imposing of a liability on, the pupil (*e.g.*, the entering on an inheritance), the concurrence of both was necessary.

**77.** *Explain :*

- (a) *The functions of a Roman tutor ;*
- (b) *The mode of his appointment ;*
- (c) *The circumstances in which he might cease to hold office.*

(a) *Functions.*

The tutor's functions fell under two heads: (1) **auctoritatem interponere**; (2) **negotium gerere**.

As regards (1) his authority was required to supplement the capacity of the pupil in all legal acts; without it such acts would be ineffectual to bind the pupil or his property. Under (2) his duties were to manage the property of the pupil; to make an allowance for his support, such allowance being, if necessary, fixed by the magistrate; to provide for his custody and education, but not to undertake the task himself.

(b) *Appointment.*

(1) *By Statute*—**Tutela Legitima.**—This was of two kinds: (a) *parentum*, (b) *patronorum*. The XII. Tables made the *agnati* tutors when the *paterfamilias* died without nominating a tutor, or when the tutor nominated died before the testator. When a testament named a tutor for a future time or conditionally, or the tutor named was incapable, or was excused from acting, the agnates did not assume the tutelage; it passed to a *tutor dativus*, i.e., a tutor named by the magistrate.

Justinian conferred the *tutela legitima* on the next-of-kin, whether agnate or cognate.

The patron and his children became the tutors of a freed-man under age.

The *paterfamilias* was the *tutor legitimus* of a *filius-familias* under age.

(2) *By operation of law*—**Tutela Fiduciaria.**—In the time of Gaius, this term was applied to the tutelage vested in a person, who in the process of emancipating a son, instead of remanipating the son to the father, manumitted him, and so became his patron. He held the tutelage in trust for the father. In the time of Justinian, the term was applied to the tutelage vested in the *filiifamilias* over an *impubes* emancipated by the *paterfamilias*, on the latter's death, without nominating a tutor.

(3) *By testament*—**Tutela testamentaria.**—No one but a *paterfamilias* could nominate a tutor by testament, and

he could only do so for such of his descendants as became *sui iuris* on his death. He could, however, nominate a tutor to a posthumous child.

(4) *By appointment by a magistrate—Tutela Dativa.*—

Tutors were thus appointed when there was no testamentary or *legitimus* tutor, or whenever the office was otherwise vacant. By the **Lex Atilia** (date uncertain) it was provided that the appointment of tutors at Rome should be made by the *Prætor urbanus* and a majority of the tribunes, and by the **Lex Iulia et Titia** (B.C. 31) appointments in the provinces were to be made by the *Præsides*. Some changes in the appointing authorities were subsequently made by the Emperors, the *Præfect* of the city being invested at Rome with co-ordinate jurisdiction with the *Prætor*. In Justinian's time the appointment was made at Rome by the urban *Præfect*, and where the property of the pupil was small by the *Prætor*; in the provinces, where the property of the pupil was under 500 *solidi* by the municipal magistrates in conjunction with the bishop, and in other cases by the *Præsides*.

(c) *Ceasing to hold office.*

The tutor was discharged from his office—

- (1) By the pupil reaching puberty;
- (2) By death or *capitis deminutio* of the pupil;
- (3) By death or *capitis deminutio maxima* or *media* of the tutor, or in the case of tutors *legitimi*, by *c. d. minima*.

(4) In case of testamentary tutorship, where the appointment is for a certain time or subject to a certain condition, by the expiration of the time or the fulfilment of the condition;

(5) In the case of tutors *dativi*, where appointed pending a condition or until a certain time by the fulfilment of the condition or expiration of the time;

(6) By magisterial discharge after showing grounds of excuse to the satisfaction of the magistrate.

(7) By a magisterial order for removal, on the ground of misconduct, in an *actio suspecti*. This involved infamy.

78. "**Tutela**, which began by being conceived as a right, was eventually regarded as a burdensome duty." Explain this statement.

The original object of *tutela* was to protect the interests of the ward's family, and to prevent the alienation of the ward's property to the prejudice of the rights of succession of the agnates. The *tutela legitima* was thus closely connected with the right of succession, and devolved on those persons who were interested in the succession. The gradual disintegration of the joint family organisation and the growth of testamentary power led to the institution being regarded from an entirely different point of view. It came to be looked upon as an office of trust, the main object of which was the protection of the ward and his or her property during minority, the tutor being strictly accountable and precluded from deriving any profit from his office. It thus became a burdensome duty, exemption from which was regarded as a privilege only to be conceded on special grounds, such as public service, age, professional status, adverse interest, etc.

79. How did tutelage of women of full age differ from tutelage of *pupilli*? Do you know of any stages in the disappearance of the former?

The *tutela* of women differed from that of *pupilli* in the following points:—

I. It continued for life, while *tutela* of *pupilli* came to an end on attainment of puberty.

II. The *pupillus* required the *auctoritas* of the tutor for all legal transactions which might involve liability; a woman above the age of puberty, however, could alienate *res nec mancipi* and could take part in any legal transaction not dependent on the strict *ius civile* without the intervention of her tutor.

III. In the case of women above the age of puberty, the tutor's powers, at any rate in later times, were confined to giving his *auktoritas*; he could not interfere in the management of her property.

IV. A woman, unlike a *pupillus*, was, in many cases, able to choose her tutor.

V. In the time of Gaius a woman could usually compel her tutor to give his *auktoritas* to her acts, unless the tutor were a patron or parent (G. I. 190 and 192).

VI. *Tutela* of women might, in most cases, be transferred.

*Stages in disappearance of tutela mulierum.*

(a) Various expedients adopted to enable a woman to choose or change her own tutor, *e.g.*, direction in the ascendant's will to that effect, and fictitious *coemptio*.

(b) The *Leges Julia et Papia Poppæa* provided that *ingenue* having three, and freedwomen having four, children, should be free from *tutelage*.

(c) Abolition of tutorship of *aggrates*, in the case of women of full age, by Claudius.

It was revived in a modified form, *i.e.*, in conjunction with tutorship by cognate brothers of full blood, by Constantine, but disappeared before the time of Justinian.

In the time of Gaius the *tutela mulierum* had become a mere form except in the case of tutorship of patrons and parents.

**80.** Show the origin and development of **Cura Minorum**. How did the functions of a Curator differ from those of a Tutor? In what cases was a Curator appointed in mature Roman Law?

No provision appears to have been made for the protection of persons over the age of puberty, other than insane and imbecile persons and prodigals, prior to the **Lex Plætoria**, an enactment referred to by *Plautus*. This subjected to infamy and criminal prosecution any one who took fraudulent

advantage of minors under twenty-five years of age. Subsequently the Prætor introduced the remedy known as **restitutio in integrum**, by which he decreed the rescission of any transaction detrimental to a minor, and restored him to his former position. In consequence, the practice grew up of appointing curators to look after the interests of minors in the transaction of any business of importance. A constitution of Marcus Aurelius directed curators to be appointed, on the application of a minor, as a matter of course; and it came to be the duty of a retiring tutor to advise the pupil to obtain a curator. In the later Empire it was the custom to appoint permanent curators to minors having property to manage. In three cases the appointment of a curator could be insisted on. When a minor (1) was party to a law-suit, or (2) had a payment to receive, or (3) tutors were rendering their accounts, the rival litigant, the debtor, or the tutor, could require the appointment of a curator to protect themselves against the renewal of the suit, or to avoid any question as to payment or the accuracy of the account, as the case might be.

For the difference between functions of Curator and Tutor, see **72** and **73**.

**81.** *What is meant by perfecta ætas? What disabilities or privileges were recognised in persons under perfecta ætas?*

**82.** *What, in connection with the law of guardianship, is meant by venia ætatis?*

By **perfecta ætas**, in Roman Law, was meant the age of twenty-five, when a person became fully capable of acting for himself in all respects without the intervention of a tutor or curator.

Persons under twenty-five, although in the earlier law capable of acting for themselves, were at an early date protected from imposition by the *Lex Platoria* (about the end of the third century B.C.), which made persons circumventing minors liable to criminal proceedings. The Prætor

also intervened in favour of minors, and would decree a *restitutio in integrum* in any case in which a transaction operated to their detriment. In later Roman Law no transaction was binding on a minor without the consent of the curator [see Girard, pp. 230—1] unless *venia ætatis* had been granted to the minor.

The alienation, except under imperial authority, of lands belonging to minors was forbidden by a Sc. under Septimius Severus.

**Venia ætatis** (introduced by Severus and Caracalla) was a term applied to the dispensation, occasionally granted to persons under twenty-five years of age, enabling them to manage their own affairs without the assistance of a *curator*. It might be granted to males when over twenty years of age, and to females when over eighteen.

**83.** *State what you know of the history and character of the curatorship of prodigals.*

The interdiction of prodigals had been recognised by customary law even prior to the XII. Tables. That law provided that prodigals should be placed under the curatorship of their agnates. This provision, however, only applied to the case of those who wasted the property coming to them on intestacy from an ascendant. (The Prætor extended the interdiction to persons dissipating their property, in whatever way acquired, but in such cases the curator was appointed by the magistrate (*dativus*) on the application of the relations: the office did not necessarily devolve on the agnates. The curator was entrusted with the management of the prodigal's property, the latter being disabled from doing any act by which his property might be alienated or charged, or which might subject him to liability, without the approval of the curator.)

**84.** *What means were provided by Roman Law to secure the due discharge of their duties by tutors and curators?*

I. Tutors and curators *legitimi*, and those appointed by

inferior magistrates, were required to give security for the proper discharge of their duties.

II. Tutors and curators appointed by the superior magistrates were appointed "after inquiry." They were nominated by an inferior magistrate, whose duty it was to inquire as to their fitness for the office and who was responsible if he made an improper nomination, and appointed by the superior magistrate.

III. An oath to administer the property as a *bonus paterfamilias* was required from tutors and curators by Justinian (Nov. 78, c. 7).

IV. They were required to make an inventory before entering on their duties.

V. Their property was subject to a tacit hypothec (introduced by Justinian).

VI. The **actio suspecti** could be brought against a tutor or curator, where he had been guilty of misconduct, to remove him from office.

VII. The *actio tutelæ* or *actio curatelæ*, as the case might be, could be brought to make them account.

**88.** *In what cases was a tutor duly appointed entitled to exemption from the Tutela?*

(1) Being engaged in the service of the state; (2) being unable to execute the duties, *e.g.*, through poverty, ill-health, or old age; (3) being in a position adverse to the pupil, *e.g.*, at enmity with him; (4) filling or having filled similar offices; (5) being a member of certain liberal professions, *e.g.*, law, medicine, rhetoric.

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### III.—LAW RELATING TO PROPERTY.

SANDARS.—II., Titles 1—9.

MOYLE.—Notes to II. 1. 11, 25, 26, 30, 39, 40; 2. 3; 3. 4; 4 pr.; 6 pr.; 7. 1—3; Excursus II. and III.

MUIRHEAD.—Sections 10, 13, 30 and 52.

SOHM.—Book II., Chapter II.

MAINE.—Chapter VIII.

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#### 1. DIVISION OF THINGS.

**86.** *State and explain the various divisions of Res, showing in each case the nature of the distinction intended to be made.*

**87.** *What rights did the public enjoy in respect of the sea, the sea-shores, rivers, whether navigable or not, and the banks of rivers?*

I. According to their physical nature; (a) *res mobiles*, moveable things; *res immobiles*, immovable things; (b) **res corporales**, corporeal or tangible things: *e.g.*, a slave; **res incorporales**, incorporeal or non-tangible things: *e.g.*, a servitude.

II. According to their modes of transfer: *res Mancipi*, transferable by *mancipatio*; *res nec Mancipi*, not so transferable.

III. According as they could, or could not, be the subject of private ownership: (a) **res in commercio** or **in nostro patrimonio**, *i.e.*, capable of being held by private individuals; (b) **res extra commercium** or **extra nostrum patrimonium**, *i.e.*, not so capable, being: (1) *res communes*;

(2) *res publicæ*; (3) *res universitatis*; (4) *res divini juris*: *sacræ, religiosæ, sanctæ*.

**Res communes**: things common to everybody: for example, the air, the sea, the seashore up to the highest tide-mark of winter storms. Erections might be placed on the seashore by private individuals, and nets and boats might be hauled up there. **Res publicæ**: things belonging to the State; *e.g.*, (a) rivers, whether navigable or not, and their banks. The ownership of the banks remained in the owners of the riparian land. The bank extended to the highest reach of the river, and could be used by anyone for the fastening of boats, or the landing of cargoes. The right of fishing was free to all. (b) Public roads; (c) ports and harbours. **Res universitatis**: things belonging to the corporate bodies, *e.g.*, theatres, racecourses. **Res divini iuris**: things devoted to the gods or hallowed things; *sacræ* were things devoted to the gods above, *e.g.*, temples; *religiosæ* were things devoted to the gods below; *e.g.*, burial grounds; *sanctæ* were things hallowed; *e.g.*, walls of cities.

88. Enumerate the various classes of things considered *Res Nullius*.

**Res nullius**: things having no owner but capable of ownership by *occupatio* were: (a) wild animals; (b) things taken in war; (c) islands formed in the sea; (d) things found on the seashore; (e) things intentionally abandoned by their owner; (f) treasure-trove. **Treasure-trove** is treasure deposited in a place for so long a time that no one can tell who is the owner of it. When treasure has been hid in the earth for safety, it is not treasure-trove, unless it is so ancient that the owner of it is unknown (Hunter). The rule governing treasure-trove was that the chance finder took one half and the owner of the place of discovery the other half. If such place had no owner (*e.g.*, a burial ground) the finder took all

89. *How far could wild beasts, birds, and fish be the subject of ownership?*

These were *res nullius*, but became private property on their capture wherever taken. They remained the captor's property until they regained their freedom. In the case of those which were in the habit of going and returning they remained the property of the owner so long as they intended to return (J. 2. 1. 12 and 15).

90. *Gaius says: "The difference between res Mancipi and res nec Mancipi is a great one." What was this difference? Give examples of each of these kinds of res, and state any explanations of the origin of the distinction with which you are acquainted.*

(The difference was in the mode of conveyance. **Res Mancipi** could only be conveyed by **mancipatio** or by a fictitious suit called **Cessio in iure**, both of them solemn and cumbrous methods. **Res nec Mancipi** passed by mere delivery. Italian soil, slaves, animals such as oxen, horses, and asses, rural servitudes on Italian soil, were all *res Mancipi*. Provincial soil, wild animals such as elephants and camels, implements of husbandry, and, generally speaking, most movables were *res nec Mancipi*. The distinction is not very clearly defined.) Various explanations of the distinction have been hazarded. Sir H. Maine suggests that *res Mancipi* were those things which were specially regarded as objects of property by early agricultural communities, and *res nec Mancipi* things which only came to have proprietary importance at a later stage of society when the inconvenience of the cumbrous methods of early conveyance had already become apparent. Ihering regards *res Mancipi* as those things which were regarded as essential to the maintenance of the joint family. Professor Muirhead adopts the explanation that *res Mancipi* were those objects of property in respect of which a man was rated in the *census*, and conjectures that the distinction was

introduced by Servius Tullius. The theory now generally accepted is that the distinction is based on an early classification of property into *familia* or family property and *pecunia* or private property [see note on p. 17 of Moyle].)

## 2. RIGHTS OF PROPERTY.

### (a) *Dominium—Possessio.*

#### 91. *Distinguish Possessio and Dominium.*

**Possession** is something distinct from ownership. The owner may or may not have possession of the thing he owns: *e.g.*, the borrower of a thing has possession of it but the property is in the owner; the tenant is in possession of the holding which belongs to the landlord. It is thus seen that possession may merely contemplate the physical control of a thing. This is called **Detentio**, and sometimes **Naturalis Possessio**, or the person is said *in possessione esse*. Such possession confers no rights at all. But if physical control is accompanied by a further element called animus possidendi, or the mental determination to deal with the thing as owner, we have another and stronger form of possession. It must be noticed that this intention does not depend upon *bona fides*: it does not mean simply that the possessor believes himself to be owner. A thief may have such an intention and generally has. This possession, consisting of the exclusive physical power of dealing with a thing and the intention of dealing with it as one's own as against all the world, is called simply **Possessio**, or sometimes **Civilis Possessio**, and such possession was protected by the interdicts of the Prætors.

In some cases the law recognises possession where the possessor has only the intention of exercising the possessory rights of the owner and not of dealing with the thing as owner himself. Such is the possession of the stakeholder (*sequester*), of the pledgee, and of the holder of a *precarium*.

**Dominium** or **Dominium ex iure Quiritium** was the ownership which alone was recognised by the *ius civile*. It was confined to Roman citizens and others having the *commercium*, and the ownership could only be transferred by the cumbrous methods of *mancipatio* or *in iure cessio*. A defect in or the omission of these formalities vitiated the title, but this might be cured by lapse of time (*usucapio*).

The prætor, however, intervened to protect possessory rights, and the cumbrous civil law mode of transfer gradually became obsolete, giving place to a simple transfer by delivery.

92. What do you understand by Bonitary Ownership? How did it arise? How was it that in the time of Justinian the term had become "*vacuum et superfluum*"?

93. What interests, short of full ownership, were so protected by the Prætor as practically to be equivalent to ownership?

*Distinguish between Civil and Natural possession.*

94. Explain the meaning of the following statements (taken from the Digest):—

(a) We are said to have a thing "*in bonis*" when, to protect our possession thereof, we can employ an exception, and to recover possession thereof we can employ an action.

(b) Possession can be acquired only *animo et corpore*.

Give an example of the Bonitary ownership referred to in (a), and an example of a protected possession which was not Bonitary ownership, and an example of a mere physical possession (or detention).

In early Roman Law the only civil ownership, i.e., ownership recognised by the *ius civile* was **Dominium ex iure Quiritium** which was acquired by *mancipatio* or *in iure cessio*.

Where the conveyance was made without the necessary formalities by mere delivery, or where the formal conveyance was invalid through some omission in the forms, the defect might be cured and a good title obtained by *usucapio*.

There remained, however, many cases in which a *bona fide* possessor received no protection from the *ius civile* although justice demanded it; thus, he required protection during the period necessary for the operation of *usucapio*; and, again, the possessor might not be capable of acquiring legal ownership, nor the thing be the subject of such acquisition. To protect such possessor the Prætor first extended his interdicts. Subsequently he introduced the **Actio Publiciana**, based on the fiction of a completed usucapion, to protect the rights of persons who had acquired *res Mancipi* in good faith by delivery without the formalities of *mancipatio* or *in iure cessio*. As against the quiritarian owner inequitably seeking to recover possession of the thing defectively conveyed he allowed an *exceptio* (e.g., *exceptio rei venditæ et traditæ*). These latter remedies were, of course, only applicable to persons having the *commercium*, that is, capable of quiritary ownership. Equitable ownership, thus protected by the Prætor, was termed by the Roman writers **in bonis habere** and by modern civilians is described as **Bonitarian**.

Between the time of Gaius and Justinian the distinctions between *res Mancipi* and *res nec Mancipi* and between Roman and Provincial land became obsolete and the only form of ownership recognised was possessory ownership, protected by a real action universally available to the subjects of the Empire and termed *vindicatio* in analogy to the ancient action of that name. Hence the distinction between civil and equitable ownership had practically disappeared and was expressly abolished by Justinian as "empty and superfluous."

For distinction between Civil and Natural possession, and also as to (b), see 91.

95. Distinguish, with examples, between (a) detention, and (b) legal or interdictal possession.

**Detentio** is mere physical control of a thing, and expresses the powers of a person "who has the physical

power of dealing with a tangible object to the exclusion of everyone else, and is aware of such power" (Moyle). It is sometimes called *naturalis possessio*, and the holder is said *in possessione esse*, or to have *custodia*. Where to the *detentio* there is added an intention on the part of the holder to hold the thing and to deal with it as owner, we have **Possessio**, that is, legal, civil, or interdictal possession, a possession which the law recognises and which is protected by interdicts.

- ✓ The slave, the *filiusfamilias*, the manager or agent had detention and not possession of the property of the master, *paterfamilias*, and principal respectively. So the borrower and *conductor* and depositary had detention, while the lender and *locator* and depositor retained possession. The *Emphyteuta* had possession as well as detention. The mortgagor had by a legal fiction usucapion-possession, *i.e.*, a possession capable of being converted by lapse of time into dominion; the mortgagee had interdictal possession.

As regards servitudes it must be noted that detention was confined to corporeal things, and as there could be no possession without detention, the owner of a servitude had no possession, but he was supposed to have a quasi-possession, and this was protected by the *Prætor's* interdict.

**96.** *Distinguish between Possession and mere Detention (or Custody), giving examples from Roman Law.*

*Anulus entered on possession of a farm as heir ab intestato of Balbus. A year later, in the middle of harvest, a will of Balbus was found, under which the farm belonged to Caius. To whom do the crops belong?*

- ✓ Possession, as a legal right, involves (1) the physical control of the thing said to be possessed, and (2) the intention to act as owner to the exclusion of all other persons.
- ✓ Detention (or Custody) is merely the exercise of physical control over the thing without the intention of asserting any right of ownership on one's own behalf.

Thus, the person who claims to be owner, although under a defective title, as where he has bought a thing from a non-owner, has possession. But a depositary, a borrower, a lessee, only have detention, the *animus domini* being absent.

(There were four anomalous cases in which, although the *animus domini* was absent, possession was recognised, viz., in the case of the pledgee, the permissive holder (*precario rogans*), the *sequester*, and the *emphyteuta*.) [See *Poste*, p. 619, and for an explanation of reasons for "possession" being recognised in these cases, see *Hunter*, pp. 380 *et seq.*]

If Aulus has sown the crops, he is entitled to reap them or to be compensated, being in *bonâ fide* possession. [J. II. 1. 32 & 37].

As regards *fructus naturales*, he is not liable for such as have been consumed (including such as he has disposed of), but he must hand over those still existing at the time he becomes aware of Caius's rights.

(b) *Iura in Re Aliena*.

- (i) *Servitudes*.
- (ii) *Emphyteusis*.
- (iii) *Superficies*.
- (iv) *Pignus and Hypotheca*.

97. What was the nature of a *Servitude*? Classify and distinguish the several kinds of *servitudes*.

98. Classify *servitudes* in the *Institutes*, noting briefly the character of the rights in each case.

A **servitude** (*servitus*) is defined by Dr. Moyle as "a real right, vested in or annexed to a definite person or piece of land, over some object belonging to another, and limiting the enjoyment of that object by that other in a definite manner." It was a portion of the numerous rights which go to make up full ownership (*dominium*) vested in a person other than the owner. The rights of ownership may be summed up as the right of using (*ius utendi*), the right of

enjoying the fruits of (*ius fruendi*), and the right of destroying (*ius abutendi*), the property of the owner. If any one, or a part, of these rights be vested in a person other than the owner, such person is said to have a servitude, and the property is said to be subject to the servitude (*res servit*).

I. **Personal**: *Ususfructus*: the right of enjoying the fruits of, and the use of, the property of another without impairing the *corpus*. *Usus*: the right of having the mere use of the property of another, but not the fruits. *Habitatio*: the right of residing in a house.

II. **Prædial**: Those rights over an immovable (**prædium serviens**) vested in a person by virtue of his holding other land (**prædium dominans**). These were:

(1) *Rural*: **servitutes prædiorum rusticorum**, servitudes exercised over the land itself and not over the erections upon it. The chief were: *Iter*: right of passage on foot or horseback; *Actus*: right of passage for light vehicles or for cattle; *Via*: right of way in any manner; *Aquæductus*: right of leading water; *Pecoris ad aquam appulsus*: right of watering cattle; *Aquæhaustus*: right of drawing water; *Ius pascendi*: right of pasture; *Calcis coquendæ*: right of digging chalk.

(2) *Urban*: **Servitutes prædiorum urbanorum**; rights existing over the *superficies*, i.e., anything erected on the land. The chief were: *Oneris ferendi*: right of support; *Tigni immittendi*: right of inserting a beam; *Stillicidii recipiendi*: duty of receiving rain water from a neighbour's roof; *Altius non tollendi*: right to prevent a neighbour raising his buildings higher; *Ne luminibus officiatur*: right to light.

99. What is your conception of the relation between Servitude and Ownership? Explain the distinction between affirmative and negative servitudes.

Ownership consists of rights over property unlimited in point of (a) user, and (b) duration. It includes a variety of

rights which may be summed up into three classes: the *ius utendi* or right of use; the *ius fruendi* or right of enjoying the fruits and profits of the property; and the *ius abutendi*, or right of consuming, destroying or disposing of the property in any manner. Some of these rights might be detached and conferred upon another person who was then said to possess *iura in re* or *iura in re aliena*, rights over a thing of which the *dominium* rests in another person. Servitudes were instances of such rights, as also were *emphyteusis*, *superficies* and *pignus*.

An **affirmative servitude** is one in which the owner of the servient tenement was bound to allow the dominant owner to do something which otherwise he could restrain him from doing. All servitudes relating to land are of this character.

A **negative servitude** is one which imposes upon the owner of the servient tenement the obligation of refraining from doing some act which he otherwise might do, *e.g.*, the obligation not to raise his house higher than his neighbour's.

100. *What is the basis of the distinction between Prædial and Personal Servitudes? Could a right of way be acquired by long user?*

The distinction depends upon whether the holder of the servitude exercises his right by virtue of being the owner of land or a house (*prædium*) or independently of such ownership. If the former, he has a prædial servitude; but if his servitude is not given to him by virtue of his being the owner of a *prædium*, it was called Personal. Thus, there cannot be a prædial servitude without two *prædia*, the one *serviens*, the other *dominans*.

Incorporeal things (*e.g.*, a right of way) not being capable of physical possession, were generally regarded as incapable of acquisition by usucapion, but instances are met with in Cicero. The **lex Scribonia** (date uncertain) prohibited such usucapion unless the rights were simply appurtenant to land acquired by usucapion. (Servitudes over provincial

soil could be acquired by prescription, and this mode of acquisition was introduced through the Prætor's Edict in the case of Italian soil also. In the time of Justinian all kinds of servitudes could be acquired in this way.

**101. Explain—**

(a) "*Nulli res sua servit.*"

(b) "*Servitus non ea natura est ut aliquid faciat quis sed ut aliquid patiatut aut non faciat.*"

(c) "*Servitus servitutis esse non potest.*"

(a) "No one can have a servitude over his own property." The owner of the whole is the owner of the part. An owner who has granted a servitude and then receives it back, cannot maintain such servitude separate from all his other rights; such servitude becomes merged in the *dominium*.

(b) "The nature of a servitude is not such as that the servient owner should do something, but that he should suffer something to be done, or abstain from doing something." That is to say, a servitude consisted *in patiendo*, in which case the *dominus* had to allow the other to do something from which he might otherwise have been restrained; or it consisted *in non faciendo*, that is, the *dominus* was restrained from doing some act which he might otherwise have done. But a servitude could not consist *in faciendo*, that is in the *dominus* doing something, because this would create a *ius in personam*, whereas a servitude was a *ius in rem*.

(c) "There cannot be a servitude of a servitude." This is strictly applicable only to prædial servitudes. Such servitudes were in their nature indivisible for the effect of allowing rights in the nature of servitudes to be created in servitudes would be to increase the burden on the servient property.

**102. Define Usufruct. Over what things could it be established? What was the legal method of creating Usufruct?**

**103.** *Explain and illustrate the form of property known as Usufruct.*

**104.** *Distinguish between Usufruct and Quasi-Usufruct. What were the rights of a Fructuarius?*

**Usufruct** was the right to use and to enjoy the fruits of the property of another, maintaining its substance intact. The *usufructuarius* had the *ius utendi*, and also the *ius fruendi*, that is, the produce ordinarily arising from the property. Examples: the usufruct of cattle enabled the *usufructuarius* to use them and to benefit from their produce or their young. The usufruct of a house enabled him to use the house and to pocket the proceeds of letting it. Usufruct strictly could only exist over such things as were not consumed by use, because the property had to be returned intact after the expiration of the term. The property, however, need not be land, but might consist of slaves, or flocks, or the like, because these are not consumed by using them. A *senatus consultum*, however, allowed a right similar to a usufruct, termed a **quasi-usufruct**, to be created over such things as were consumed by use, *e.g.*, money, corn, and wine. In this case security had to be given for the return of an equivalent in quantity and quality. This was not strictly usufruct.

(The **fructuarius** had the use, and enjoyment of the profits, of the subject of the usufruct. This included the stock and instruments of a farm, the stakes necessary for his vines, the working of mines, and quarries, and pits, already opened.) As to the opening of new mines, etc., the authorities are somewhat conflicting; it would appear that he could open mines, etc., if this would not involve diverting land from profitable cultivation. The usufructuary of a house could not alter the character of the building, but he could let it provided it was not already let when the usufruct was created. Although strictly the usufructuary could not alienate his interest, he was allowed under the later law to sell or let it.

For modes of creating a usufruct, see **105** and **107**.

**105.** *How were servitudes created and extinguished? To what extent is Ususfructus to be classed with servitudes?*

### Creation of servitudes.

I. <i>Mancipatio</i> [in the case of rural servitudes in Italian soil].	} Obsolete in Justinian's time
II. <i>Cessio in iure</i> .	

III. *Usucapio*, until forbidden by the *lex Scribonia* (B.C. 33), which only allowed them to be so acquired when appurtenant to land acquired by *usucapio*.

IV. *Prescription*.

V. *Deductio*, i.e., delivering possession but reserving the servitude.

VI. *Pactionibus et stipulationibus*, i.e., by agreement coupled with formal stipulations.

VII. *Testamento*, e.g., by directing the heir to allow another to exercise a right.

VIII. *Adjudicatio*, i.e., by judicial decision.

### Extinction.

I. *Remissio*, or surrender, accomplished originally by *cessio in iure*, but later by agreement, or by allowing the commission of an act which destroyed the servitude.

II. *Confusio*, or merger, where the owner of the servitude became the owner of the subject of the right.

III. *Non-utendo*, or non-use. In the case of prædial servitudes the period of time was two years until Justinian made it ten or twenty years according as the parties did or did not dwell in the same province.

In the case of continuous servitudes (e.g., a servitude of light) the period dates from the time that an act is done by the owner of the servient land that negatives the servitude. In the case of discontinuous servitudes (e.g., right of way) the period dates from the last time of user.

IV. Destruction or change of property, provided it was complete and not merely temporary, such as in the case of a flood over a way which is the subject of the right.

*Usufruct* is sometimes classed with servitudes and sometimes contrasted with them. It may be regarded as a servitude in that it consists of a portion of the rights which an owner of property possesses. On the other hand, the rights of user of the property by the *usufructuary*, like those of the owner, are indefinite, not capable of definite limitation; and in this respect it should be regarded as a mode of ownership, like a life estate in English law.

**106.** *It is stated that a servitude could be acquired "pactionibus atque stipulationibus." Explain fully. Could a servitude be transferred?*

*How, in the time of Justinian, could a right of way be created?*

A *pact* was an agreement which by itself was not enforceable by action. A stipulation was an agreement which the law enforced, being the chief formal contract of Roman Law. In creating a servitude the *pact* would state the nature and conditions of the rights, and the stipulation would, by fixing a penalty in default of the pact not being adhered to, make the whole arrangement enforceable (Ortolan II., 461). It is not certain that even such an arrangement would be sufficient of itself to create a servitude, which was a *ius in rem*; probably a quasi-delivery would also be necessary. Prædial servitudes could not be transferred except together with the land to which they were appurtenant. Personal servitudes also were not transferable in early Roman Law, but in later times a usufruct could be sold or leased.

In the time of Justinian a right of way could be created : (1) by prescription; (2) by *deductio*; (3) by pacts and stipulations with *quasi-traditio*; (4) by will. See **105**.

**107.** *How could Ususfructus be created? In what various ways could it terminate?*

**Creation.**—(1) By conveying the *nuda proprietas* and reserving the servitude; (2) by conveying the usufruct and reserving the *nuda proprietas*; (3) by legacy; (4) by express

enactment (*lege*); (5) by agreements and stipulations; (6) (in early Roman Law) by *in iure cessio*, but not by *mancipatio*.

**Termination.**—(1) By death, or, in the case of a corporation, after lapse of one hundred years; (2) by *capitis deminutio maxima* or *media* of the donee; (3) by cession; (4) by not using it according to the terms on which it was granted; (5) by *consolidatio*, i.e., the holder of the servitude acquiring the *nuda proprietas*; (6) by loss or destruction of the thing; (7) by expiration of the time or fulfilment of the condition for or on which it was granted.

**108.** *In what respects were the rights comprised in usus less than those comprised in usufructus?*

The *usuarius* had fewer rights than the *usufructuarius*. He had nothing but the use. In the case of a farm he could only take such things as were necessary for his daily use, and could only stay on it so long as he did not annoy the owner and did not hinder the work. In the case of a house, he could dwell there himself but could not transfer the right to another, and it was doubted whether he could even entertain guests. In the case of a slave, the *usuarius* could use his labour and service only in person; he could not transfer him to another, and similarly where the use was of a beast. He had no power of alienation.

On the other hand, the *usufructuarius* had not only all the rights of the *usuarius*, but he could enjoy the fruits, work pits and mines, hunt and fish, and take the rent of the house if let. If the usufruct was over a slave he could take the results of his labour, but not his offspring. The young of animals, as well as their milk, hair, and wool, belonged to him.

**109.** *What rights were acquired by Superficies and Usus respectively? Could the rights be transferred by the holder to third parties?*

**Superficies** was the right to the enjoyment of a building for ever, subject to the payment of rent. The *superficiarius*

had the right of using and profiting by the building, and of dealing with it by alienation or pledging, in the same way as the *emphyteuta* had of the land which was held by him. In all other rights and duties the *superficiarius* resembled the *emphyteuta*.

**Usus** was the right of using the property of another without enjoying its fruits. The rights of the *usuarius* were restricted to his own personal use; it was even doubtful whether he could entertain a guest. He could not let any part of the property to another or transfer his rights therein. The holder of the *superficies* could transfer the whole or part of his rights.

**110.** *What were the Servitutes Prædiorum Urbanorum? Illustrate the rights of the Usuarius.*

See 98.

**Usus.**—The *usuarius* had the bare use of the property; he was not entitled to take any produce, but in later law he was allowed to take vegetables, wood, etc., for his daily use. The *usuarius* of a flock was entitled only to the manuring of the ground by them, but he was generally allowed to take a little milk. The use of a house enabled the holder to lodge there with his family, and, perhaps, to receive guests.

**111.** *Say what you know of the development of the tenure called Emphyteusis, and show in what respects the legal position of the Emphyteuta differed from that of (a) a usufructuary, (b) an ordinary lessee for years (conductor fundi).*

*What was the right known as Superficies?*

**Emphyteusis** was the right of exercising full rights of ownership over the property of another for a long period, subject to the payment of a yearly rent (*pensio* or *canon*) and to forfeiture under certain conditions. Origin: Lands

taken in war were leased for a long term or in perpetuity by the State, subject to a *vectigal* or rent, and such lands were called *agri vectigales*. This system was adopted by municipalities, and ultimately by private individuals, and the tenure thus created was termed *emphyteusis*. Zeno constituted *emphyteusis* a particular form of contract with its own action, putting an end to the controversy existing among the jurists as to whether it was a contract of sale or of hiring. The agreement (if any) between the parties was to prevail; but if none, then total destruction of the property terminated the contract, but partial loss fell on the tenant.

**Rights of the Emphyteuta:**—(1) All those possessed by a *usufructuarius*; (2) power of disposition; (3) power to create servitudes; (4) power of alienation, subject to the owner's right of pre-emption; (5) transmission of his rights to his heirs; (6) a real action to protect his rights.

**Liabilities of the Emphyteuta:**—(1) To pay the rent; (2) to be evicted if the rent were in arrear for three years; (3) to manage the property so as not to impair its value; (4) to bear partial loss, unless otherwise agreed.

The Emphyteuta had much wider rights than the usufructuary. He could, for example, alter the character of the land, provided he did it no permanent injury. His rights were heritable, and alienable either *inter vivos* or by will. He could effect a mortgage over the land, or servitudes for the lengths of his interest. Further, he was not bound as was the usufructuary to deal with the property as a *bonus paterfamilias*.

As compared with the *conductor fundi*, the *Emphyteuta* had a *ius in rem*, whereas the *conductor* had only a right *in personam*. The *conductor*, if evicted, could not bring an action to recover possession. His only remedy was against the *locator* for damages for breach of his contract to give quiet enjoyment.

For *Superficies*, see 109.

**112.** Compare *Ususfructus* and *Emphyteusis*. "*Usufruct which is not granted to a private individual only lasts thirty years.*" (Code Civil of France). Compare with Roman Law. See 111.

This rule did not apply in Roman Law. A usufruct lasted (failing any arrangement to the contrary) for the life of the usufructuary, but it never exceeded it. If possessed by a municipality it lasted 100 years, that being the supposed maximum duration of life.

**113.** What were the rights and duties of a creditor who had received a pledge to secure payment of the debt due to him? Compare English Law.

**114.** Explain the mortgagee's means of enforcing his security in Roman Law.

**Rights of the mortgagee:**—(1) To obtain possession of the property; (2) to sell it after giving two years' notice to the debtor to pay the debt (or such other notice as the agreement specified); (3) to pay himself and hand the balance of the proceeds to the debtor; (4) if no purchaser could be found to have the property adjudged to him after two years' notice of such intention; (5) absolute foreclosure at the expiration of a further two years, unless meanwhile the debtor redeemed the property.

**Duties of the mortgagee:**—(1) To deliver up possession of the property (in the case of *pignus*) to the debtor upon payment of principal and interest; (2) to account for the balance of purchase money if he exercised his power of sale, after deducting debt and interest; (3) to exercise *exacta diligentia*.

In English law the term mortgage implies a debt, the payment of which is secured on land or other property. At law, if the money be not paid on the day appointed, the mortgagee becomes absolute owner of the land, but in equity (which prevails over the law) the estate may be redeemed

and a re-conveyance compelled after redemption. The mortgagor in equity remains the owner, and the rights of the mortgagee are merely those necessary for enforcing payment. The rights of the mortgagee are: (a) to possession of the property; (b) to have a receiver appointed to collect the profits; (c) to bring an action to foreclose the rights of the mortgagor in default of payment within a time named; (d) to apply to the court for the sale of the property instead of foreclosure; (e) to sell the property under the powers conferred by the deed or by statute. In the case of a pledge or pawn, the creditor obtains possession with a power of sale in default of payment.

**115.** *Give a brief sketch of the history of Roman mortgage.*

Three forms of mortgage existed in Roman Law at various times:

(1) By **Mancipatio** with a collateral agreement (*contractus fiduciæ*) by the creditor to reconvey the thing mortgaged upon the payment of the debt at the time agreed. Here the debtor conveyed out and out the ownership and the possession of the security to his creditor. The objections to this were: (a) that the creditor might dispose of the property and so be unable to return it; (b) that he might refuse to take payment of the debt, and so retain the property; (c) that the debtor was deprived of both ownership and possession. To remedy these defects the prætor introduced the form of mortgage called

(2) **Pignus**. The creditor had only possession of the thing, and had to take good care of it until delivery. The security was not conveyed so as to pass the property in it, but the creditor was given possession of the thing. This was a disadvantage, because the debtor was prevented from using his property. Subsequently the prætor introduced:

(3) **Hypotheca**, a form of security by which the debtor agreed that he should hold certain things as security for the

due discharge of his debt. Neither property in, nor possession of, the security passed to the creditor. A prætor named Servius first gave effect to this by introducing an *actio Serviana* in favour of a landlord who sought to take the farm-stock of his tenant for rent due under the terms of an agreement that such stock should be held as security for the rent. It was subsequently extended by the *actio quasi-Serviana* to all cases where *any* property was held as security for any debt.

**116.** *Distinguish hypotheca from the other forms of security known to the Roman Law, pointing out the advantages which were peculiar to it.*

*Give some examples of Tacit Hypothec.*

For the distinction, see **115**.

**Examples of tacit hypothec.** Over the whole of the property of the debtor the following existed:—That of the *Fiscus* for debts arising from taxes and contract; of the husband for the *dos*, if evicted; of the wife for restitution of the *dos*; of pupils and minors for defaults of guardians; of children under *potestas* over their father's property in respect of the property coming to them on the mother's side; of legatees and *fideicommissarii* for payment of legacies and trusts.

Over certain specified property existed: The **Urban Hypothec** which a landlord had over the furniture and articles for personal use in a dwelling-house, granary, inn, or threshing-floor let to a tenant; but it did not apply to farms. The **Rural Hypothec** existed over crops of the tenant, but not over other things except by agreement. Other instances were: that possessed by a person who lent money expressly to build a house in which case he had an implied hypothec over the house; that possessed specially by pupils over property bought by the tutors with their money; and that possessed by bankers over immovables bought with money advanced by them (Hunter).

## 3. MODES OF ACQUIRING PROPERTY.

**117.** *Classify and explain briefly the various methods of acquiring Dominium under the Ius Civile and the Ius Gentium respectively.*

**118.** *Give the different modes of acquiring things in Roman Law. What is the meaning of the distinction between (1) *Adquisitio Naturalis* and *Civilis*; (2) *Dominium Civile* and *Naturale*?*

**119.** *Enumerate the different methods by which things could be acquired Per Universitatem.*

Single things could be acquired by :

<i>Mancipatio</i>	}	<i>Ex iure civili</i> or <i>adquisitio civilis.</i>
<i>Cessio in iure</i>		
<i>Usucapio</i>		
<i>Occupatio</i>	}	<i>Ex iure gentium</i> , or <i>adquisitio naturalis.</i>
<i>Accessio</i>		
<i>Fructuum perceptio</i>		
<i>Præscriptio</i>		
<i>Traditio</i>		
<i>Donatio (?)</i>		

Universalities of things (*universitas rerum*) were acquired by :

- Testamentary succession ;
- Intestate succession ;
- Arrogation ;
- Bonorum venditio* (sale of a debtor's estate) ;
- Forfeiture under the *Sc. Claudianum*.
- Addictio bonorum libertatis causa.*

**Adquisitio civilis** was acquisition of property by virtue of the civil law, i.e., by one of the modes recognised and effectuated by the civil law. Such modes were available only to Roman citizens and persons having *commercium*.

**Adquisitio naturalis** was acquisition by virtue of the *ius gentium* ; that is, such as did not depend upon the civil law of Rome, but which all systems of law recognised as legitimate

modes of acquisition. **Dominium civile** and **naturale**: Both terms meant legal ownership, the only difference being the manner in which the *dominium* was acquired: If by the methods of the *ius civile* it was called *civile*; if by natural methods (e.g., *occupatio*) it was termed *naturale*.

**120.** *Modes of acquisition are sometimes distinguished as either original or derivative. What would you put in the former class, so far as Roman Law is concerned?*

In the former would be: (1) *Accessio*, including *alluvio*, *confusio*, *commixtio* and *specificatio*; (2) *Usucapio* and *prescriptio*; (3) *occupatio*; (4) *Fructuum perceptio*.

**121.** *Describe Mancipatio and In iure Cessio as modes of acquisition.*

**Mancipatio** was a fictitious sale, a ceremony only available to Roman citizens and other persons having *commercium*, and in respect of certain kinds of property. It required not less than five witnesses and also a *libripens* or balance holder, all these persons being Roman citizens above the age of puberty. The purchaser pronounced certain formal words (e.g., on the conveyance of a slave): *Hunc ego hominem ex iure quiritium meum esse aio, isque mihi emptus est hoc ære æneaque libra*. He then struck the scale with a piece of bronze which he delivered to the vendor by way of purchase money.

**In iure cessio**, was a surrender in a fictitious suit or *vindicatio*. It took place before a magistrate, e.g., the prætor at Rome or the *præses* of a province. The person to whom the object was to be conveyed laid formal claim to it, saying (e.g., in the case of a slave): *hunc ego hominem ex iure quiritium meum esse aio*. The former owner not contesting the claim, the magistrate awarded the slave to the claimant.

**122.** *What provisions existed in Roman Law for the acquisition of property by length of time?*

**123.** *Distinguish and explain Usucapio and Præscriptio. In what respects may both be contrasted with limitation of actions ?*

**124.** *In what cases did enjoyment of a right for a lengthened period confer the ownership of the right ?*

(1) **Usucapio.** A mode of acquisition by lapse of time, authorised by the XII. Tables for the purpose of curing the defects of an informal conveyance. For conditions, see **125**.

(2) **Præscriptio longi temporis.** A mode of acquiring property by lapse of time introduced by the prætors to protect the possessory title of those who, not being Roman citizens, could not acquire by *usucapio*, or to give a title to property which was not the subject of quiritary ownership. At first it only operated by way of limitation of action, being a defence available to the possessor against any one claiming the property. It subsequently came to be regarded as a mode of acquiring ownership. Its requisites were in the time of Justinian: (a) Possession *bonâ fide* and *ex iusta causa*; (b) no taint of illegality in the thing; (c) lapse of time, namely: Three years for movables; ten years for immovables, if the parties lived in the same province; twenty years if they lived in different provinces.

(3) **Possessio longissimi temporis.** In the time of Justinian, possession for a very long time, *i.e.*, thirty years when the property was not obtained *ex iusta causa*, or was tainted, and forty years in the case of ecclesiastical property, removed the taint and gave ownership to the possessor.

#### **Distinction between Usucapio and Præscriptio.—**

(1) *Usucapio* operated by civil law; *præscriptio* operated by the prætorian law; (2) *usucapio* gave quiritary dominium; *præscriptio* gave prætorian possession; (3) *usucapio* was interrupted only by the judgment in an action: *præscriptio*, being merely a defence, did not avail unless the time had elapsed before the *litis contestatio*, or joinder of issue;

(4) *usucapio* carried with it all the liabilities of the thing; *præscriptio* gave possession free from incumbrances.

In the time of Justinian the distinctions between different lands and different kinds of ownership were obsolete, and *usucapio* and *præscriptio* became merged; but the former term was sometimes applied to designate the acquisition of movables in three years. *Præscriptio* then gave *dominium*.

*Usucapio* and also, in later law, *Præscriptio* cured defects and made him owner who would not otherwise have been such: whereas statutes limiting the bringing of actions do not extinguish the right, they only bar the remedy.

**125.** *What conditions were necessary to the acquisition of property by Usucapio?*

*To meet what practical difficulties was this mode of acquisition allowed?*

The object of **usucapio** was to remedy defects in conveyance. Its requirements were:

I. Possession *bonâ fide* and *ex iusta causa* (i.e., by one of the recognized modes of transfer);

II. The thing must not be tainted (*res vitiosa*), i.e., illegally acquired;

III. There must be capacity for quiritary ownership on the part of the possessor;

IV. Possession must be held for two years if the property be immovable, and one year for other things.

This mode of acquisition was introduced to cure defects arising from informal conveyances, e.g., where a *res mancipi* was conveyed by mere *traditio*, such a transaction was invalid to pass the property by the *ius civile*, but the defect in title might be cured by *Usucapio*.

**126.** *Distinguish Usucapion and Prescription. On what general principles do you justify the effect of lapse of time upon the acquisition and the loss of legal rights?*

Both *Usucapion*, and, in later Roman Law, *Prescription*, were methods of acquiring a title by uninterrupted

possession for a certain period. Usucapion required one year's possession in the case of movables, and two year's possession in the case of immovables. For Prescription, three year's possession was required in the case of movables and ten years (or, if the owner lived in a different province, twenty years) in the case of immovables. In its origin, however, prescription operated only as a defence, by way of limitation of action.

Both required that the possession should be (a) *ex iusta causa*, (b) *bonâ fide* and (c) without interruption. But, in addition to the difference in the periods required, as above stated :

(1.) Usucapion was only competent to those having *commercium* and only to things to which the *ius Italicum* applied ; while prescription was in force in the provinces.

(2.) Usucapion conferred ownership, but subject to any incumbrances to which the thing was subject ; while prescription availed against incumbrancers who had not asserted their rights for the requisite period.

(3.) Usucapion was not interrupted by the commencement of an action. It might be completed at any time before judgment. Prescription was interrupted by the bringing of an action.

The general principles on which lapse of time is allowed to constitute a title are : (1) that security in the enjoyment of property would be seriously impaired if no limitation of time were put on the assertion of rights of ownership ; (2) the difficulty and, in most cases, the impossibility that would otherwise arise, of proving ownership where the title was derivative, where the ownership had been acquired from some preceding owner, *e.g.*, by sale, gift, etc.

**127.** Give a general account of *Usucapio* as a mode of acquiring property. What was the effect of lapse of time upon (a) the acquisition, and (b) the loss, of a servitude? "User as of right," says a writer on the English Law of Prescription, "can best be explained by reference to the

Roman phrase, '*nec vi nec clam nec precario.*' " What does the phrase mean in Roman Law?

**Usucapio** was a method of acquiring property recognised by the *ius civile* by continuance in undisturbed possession thereof for a certain length of time under certain conditions (see 125).

It was introduced to cure the defective titles arising from informal conveyances of *res mancipi*.

By the **lex Scribonia** the usucapion of incorporeal things was forbidden unless they were merely appurtenant to land acquired by usucapion. Before this law the general rule seemed to be against the acquisition of servitudes in this way, but instances to the contrary are mentioned by Roman writers. Servitudes could be acquired, however, by the prætorian title of *longi temporis possessio*.

A servitude might be lost by non-user for a certain time, which in the case of prædial servitude in Italy was fixed at two years, and in other cases at the periods required by prescription, viz., ten or twenty years, according as to whether or not the parties lived in the same province. Justinian made the latter periods universally applicable.

By Roman Law it was essential that the object of usucapion should be free from taint or vice. By the Law of the XII. Tables and the **lex Atinia** stolen property could not be so acquired either by the thief or anyone else, and by the **lex Julia et Plautia** the same disability was attached to lands possessed by force (**vi**). It was also essential that there should be *bona fides* on the part of the holder, and this could not exist if he was holding secretly (**clam**). Further, the possession must be adverse, and this was inconsistent with **precarium**, i.e., a tenancy at will.

**128.** Explain clearly the meaning and extent of the requirement of *bona fides* and *iusta causa* (or *iustus titulus*) in the Roman Law of Usucapion.

The possessor at the time of obtaining possession must *bona fide* believe that the person from whom he received

the thing was the lawful owner of it. A belief arising from a mistake in law would not avail him, but if the mistake was one of fact, and such as to be excusable, time would run in his favour. In three cases, however, *bona fides* was not required :

(1.) **Usucapio pro herede**, by which, property, either movable or immovable, belonging to an inheritance could be acquired after one year, although the possessor was not the proper heir. This was abolished by the Sc. Iuventianum in the time of Hadrian.

(2.) **Usureceptio ex fiducia**. So also where the original owner of a thing given to another to hold for him *fiduciae causa*, had obtained possession of it; but if the thing had been pledged the new possession, if acquired at the request of the pledgor, would not count.

(3.) **Usureceptio ex prædiatura**. The owner of a thing mortgaged to the State and sold for non-payment of the mortgage debt, could acquire the thing by usucapion against the purchaser if he could hold possession of it for a year, if a movable, and two years, if immovable.

It was also necessary that the possessor should have obtained the thing *iusta causa*, that is, he must have acquired by some title recognised by law, *e.g.*, sale, gift, etc. A mistaken belief that possession has been so acquired will not suffice.

**129.** “ *Unde in rebus mobilibus non facile procedit ut bonæ fidei possessori usucapio competat.*” Explain this statement.

“ Wherefore it does not easily happen in the case of movable things that the *bonâ fide* possessor acquires by *usucapio*.” In order that *usucapio* should be effective, the possession must not be tainted in its origin. If the person who transferred the thing were not in fact the real owner he must in almost every case have known that his ownership was not genuine. That being so, the possession which he gave, even to a *bonâ fide* possessor, was tainted by theft, and the rules of *usucapio* could not operate.

**130.** *What changes did Justinian introduce into the branch of the law relating to Usucapio and Possessio Longi Temporis?*

The distinction between Italian and provincial land and between quiritary and possessory ownership had disappeared in Justinian's day; with them went the technical distinctions between *usucapio* and *præscriptio* or *possessio longi temporis*. Justinian gave ownership to the person who possessed property unaffected by vice, which he had obtained *bonâ fide* and *ex iusta causa*, for three years for movables, and ten or twenty years for immovables, according to whether the parties lived in the same province or not. The term *usucapio* was retained, and was sometimes used to denote the acquisition of movables in three years.

**130a.** *Consider the following case, giving reasons for your conclusions:—A. has lent B. a silver cup. After B.'s death his heir, thinking the cup belonged to B., made a gift of it to C. Eighteen months after, A. demands the cup from the heir, and from C. Is either the heir or C. liable?*

The heir acted *bonâ fide* and was not, therefore, guilty of theft, and was not liable. C. acquired the cup *bonâ fide* and *ex iusta causa*; his possession was not *vitiosa*; and, consequently, prior to Justinian's legislation, he would acquire the cup by *usucapio*. After Justinian's legislation, A. could recover the cup from C., as the three years then required for *usucapio* had not elapsed.

**131.** *What is meant by saying that usucapion could only result from bonâ fide possession? Were there any exceptions to this rule?*

It was essential that the possessor of a thing, in order to acquire it by *usucapio*, must believe that he has in fact received it from the owner, and that he, the possessor, can deal with it as owner.

To this rule there were the following exceptions: (a) *Usucapio pro herede*; (b) *Usureceptio ex fiducia*; (c) *Usureceptio ex prædiatura* (see 128).

**132.** *What were the requisites of acquiring property by Accessio? Illustrate your answer.*

**Accessio** was a mode of acquisition by which the owner of the principal thing became owner of the accessory thing: meaning by the latter something which could not exist without the former, or which existed for the sake of the former. (1) The person acquiring must be owner of the principal thing; (2) there must be a mixing or an attaching of the accessory to the principal of such a nature that they cannot be readily separated. *Examples:* imperceptible deposit by a river on a man's land; a piece of A.'s field is washed by a river and thrown against B.'s bank, the piece belongs to A. until it becomes attached to B.'s bank by trees, or the like, striking root into B.'s land; A.'s corn thrown on B.'s field belongs to A. until it becomes attached to the land by striking root; writing accedes to the paper on which it is written; buildings accede to the land; but an exception occurred in the case of pictures, which were regarded as the principal, and the tablets, upon which they were painted, were the accessories, so that the painter became owner of the tablet.

**133.** *"Omne quod inædificatur solo cedit." Explain the maxim, and show in what cases and upon what principles compensation might be due in respect of property lost through the operation of this rule.*

**Buildings on Land.** "Everything which is built into the soil becomes part of it." A house erected upon land becomes part of that land so as to make the owner of the land the owner of the house also. At the same time it was a fiction of law that the owner of the materials in some cases remained their owner, so that (unless otherwise compensated) he could demand them back on the building being pulled down.

The **rules relating to compensation** were the following:

I. *If A. build on A.'s land with the materials of B.* 1. If A. acted *bonâ fide*, B. might bring: (a) an action for the

materials when the building was destroyed; or (b) an *actio in factum* for the value of the materials. 2. If A. acted *malâ fide*, B. might bring: (a) an *actio ad exhibendum*, by which A. would be compelled to pay the value of the materials in default of production; or (b) the *actio de tigno iniuncto* for double the value of the materials; or (c) might claim the materials on the destruction of the building; (d) if A. had taken the materials in circumstances amounting to theft, B. could also bring an *actio furti* for penalties, and, as an alternative to the other actions, a *condictio furtiva*.

II. *A. builds on B.'s land with the materials of A.* 1. If A. were *in possession* of the land and acted (a) *bonâ fide*, he must be compensated by B.; (b) *malâ fide*, he could claim nothing, but might take such materials as were capable of being taken without damage. 2. If A. were *not in possession* and acted: (a) *bonâ fide*, he could have the materials on destruction; (b) *malâ fide*, he had no remedy at all.

**134.** *What rules applied to Specificatio? How is it distinguished from Confusio and Commixtio?*

**Specificatio** was a mode of acquisition arising from the making of a new species of thing (*nova species*) out of materials belonging to another. *Rules:* If the workman owned any part of the material the *nova species* belonged to him. If the workman owned none of the material, then: (a) If the *nova species* could be reduced to its original elements, it belonged to the owner of the material; (b) if it could not be so reduced it belonged to the workman. The owner of the materials, or the workman, must be compensated for the materials, or labour, as the case might be.

**Confusio** was the mixing together of liquids belonging to different owners. **Commixtio** was the mixing of solids belonging to different owners. If the particles could be easily separated each remained the owner of his goods. If not easily separable then, if the mixing were by the consent of both, they were owners in common; but if there were

no consent the mixture belonged to them proportionately according to the quantity and quality of their goods in the mixture.

**135.** *Describe, with illustrations, Specificatio and Occupatio as titles to property in Roman Law, and state the rules with regard to treasure-trove.*

**Specificatio** is a mode of acquiring ownership by making a new species of thing out of materials belonging to another (see **134**). *Illustrations* : A. makes wine out of B.'s grapes ; the wine belongs to A. A. makes a vase out of B.'s gold, the vase belongs to B. A. makes wine out of grapes, some of which belong to him and some to B., the wine belongs to A.

**Occupatio** is the taking possession of that which at the time belongs to no one with the intention of acquiring property therein (see **88**).

Rules with regard to treasure-trove (see **88**).

**136.** *State the law applicable to the following cases :*

- (a) "*If a man weaves into his own cloth another man's purple.*"
- (b) "*If a man builds upon his own ground with another's materials.*"
- (c) "*If a man paints a picture on another's board.*"
- (d) "*If a man found a treasure on his own land. . . . If he found it on another man's land.*"

(a) The owner of the cloth becomes the owner of the purple (by *accessio*) ; but he must compensate the owner of the purple ; and if he has acted *malâ fide*, will be liable to an *actio furti*.

(b) See **133**.

(c) The property in the board passes to the painter, but he must compensate the owner of the board, and is also liable to an action for theft if he acted dishonestly.

(d) In the former instance he keeps the whole; in the latter case, if he found the treasure by chance, he shares it equally with the owner of the land; but if he went on the land for the express purpose of searching, he takes nothing, and the whole belongs to the owner of the land.

137. Give an account of *Traditio* as a mode of transferring ownership. Distinguish between *Traditio longa manu* and *Traditio brevi manu*. Did Gift require delivery in Roman Law?

**Traditio**, or delivery, was a method of transferring ownership recognised by the *ius gentium*. The conditions necessary were:

- (1) Transfer of possession by the lawful owner;
- (2) An intention to transfer the ownership;
- (3) An intention on the part of the recipient to become the owner.

The transfer of possession might take the form of: (a) physical handing over of the thing; (b) placing the thing in view of the transferee with the intention of handing over possession thereof (**Traditio longa manu**); (c) giving up the symbols or means of taking possession, *e.g.*, the keys of a house; (d) marking articles to indicate appropriation; (e) delivery at the house of the transferee; (f) transfer of title deeds; or (g) where the transferee is already in possession (*e.g.*, as borrower), the expression of the intention to pass the ownership (**Traditio brevi manu**).

Gift in Roman Law required *traditio* to make the donee owner, and this was so even after the imperial enactments making a mere agreement to give actionable.

138. Sketch the history of the regulation by Imperial legislation of gifts *inter vivos*.

*As to form.* Originally a parol or written promise to give was not recognised as binding: *traditio* was absolutely necessary. *Ant. Pius* made such a promise binding as

between parents and children. *Constantine*, following one of his predecessors, required registration of *all* gifts, and also required that they should be evidenced by a written document containing the name of the donor, and a description of the nature of his rights and of the property, and the property had to be delivered in the presence of witnesses. *Justinian* gave legal effect to any promise to give, by enabling the donee to compel delivery by action. He required gifts exceeding 500 *solidi*, either to be registered or made in the presence of five witnesses, otherwise they were void as to the excess over that amount.

*As to restrictions.* The *lex Cincia* (B.C. 203) forbade gifts beyond a certain amount except as between certain near relatives. This law existed up to *Constantine*, but was obsolete by the time of *Justinian*. Gifts to concubines or natural children were forbidden by *Constantine*, and by subsequent emperors subject to certain relaxations. *Justinian* allowed a twelfth of the property to be so given where legitimate children were left; if there were no legitimate children, but ascendants entitled to a share of the estate, the donor might give to his concubine and natural children subject to that share; and if there were neither legitimate children nor such ascendants, no restrictions were imposed.

Gifts between husband and wife were invalid, with a few minor exceptions, such as customary presents of moderate value. The Emperor *Justin* allowed a gift by way of marriage settlement on the wife (*donatio ante nuptias*) to be increased during the marriage, and *Justinian* allowed such gift to be made after marriage (*donatio propter nuptias*).

**139.** *What was a Donatio Mortis Causa? What conditions had to be fulfilled in order that it should be valid?*

**Donatio Mortis Causa** was a gift made in anticipation of death, and subject to the condition that it should take

effect only in case of death, and be revocable until then. There were two forms of such gift: (1) The subject of the gift was given on condition that it should become the property of the donee in the event of the donor's death; or (2) the subject of the gift became at once the property of the donee, but on condition that he should return it to the donor in the event of his recovery. It was liable to be revoked by the donor during his lifetime, and was rescinded by the insolvency of the donor, or by the death of the donee before the donor.

It was governed, with a few exceptions, by the rules of legacies as to capacity to give and take. Delivery to the donee or to someone on his behalf was necessary, and Justinian required five witnesses whether the gift was in writing or not. It **differed from a legacy** in that: (1) it took immediate effect on the death of the donor without the entry of the heir; (2) the rules as to capacity to give and take were applied only at the time of death, and not at the time of disposition also; (3) a *filiusfamilias* could (even before Justinian) with his father's consent make a gift of property other than his *peculium castrense*; a *peregrinus* could make a *donatio m. c.*

**140.** Write explanatory notes on the following:

- (a) We acquire ownership in things by delivery and usucapion, not by bare agreements.
- (b) It sometimes happens that an owner has not a power of alienation, and that a non-owner has a power of alienation.

(a) *Traditio* or delivery will be found to be an ingredient in all modes of acquisition whether under the *ius civile* or under the *ius gentium*, that is to say, there must be a taking of possession of the property with the intention of becoming owner. Of mancipible things a mere delivery was not valid until title was perfected by *usucapio*, but the delivery was necessary before this could operate. A mere agreement

to give or to sell did not transfer ownership. It might give a right of action against the promisor, but there was no ownership until *traditio*. Even when Justinian made an agreement to give enforceable as a *pactum legitimum*, it is generally considered that ownership was not acquired until delivery, and the promisee until then had only a right to delivery which he could enforce by action. It is said that servitudes could be acquired by pacts and stipulations, but it is probable that something in the nature of delivery was also necessary.

(b) Owners without power of alienation : a husband as to dotal immovables ; pupils without the consent of their tutors ; the insane or interdicted ; legatees might be deprived of the power of alienation by the testator in the interests of specified persons, but not generally.

An instance of a non-owner being able to alienate is that of the mortgagee or pledgee, who could under certain conditions sell the subject of the mortgage or pledge.

**141.** *To what extent could a Civis acquire Dominium through his slave ?*

Whenever property was given, or otherwise transferred, to a slave in such a way that he would acquire the ownership of it if he were a free person, the slave acquired the *dominium* for his master. The slave could act as his master's agent even in the most formal methods of acquisition, and all that he acquired became his master's, although the latter might be ignorant of the acquisition. If, however, a person had merely the *usufruct* of a slave, he could acquire only the fruits of his labours or the profits made by the slave in dealing with the master's property. He could not, for instance, acquire a legacy left to the slave ; that went to the person having the *nuda proprietas*. If he had merely the *use* of the slave he could not acquire the fruits of his labours, but only profits made *ex re sua*, i.e., by dealing with his own property. If the slave were possessed in good

faith then the possessor acquired just as effectually as if he had the usufruct of the slave.

142. *Show how possession could be acquired, retained, or lost through an agent. Did it make any difference whether the agent was a slave of the principal or a freeman?*

Possession could be acquired through an agent although that agent was not a slave, or under the *potestas* of the possessor. Possession was the holding of property with the intention of acting as owner thereof. But a person might be in possession without such intention: he was then said to be *in possessione*. If therefore such person, A., went into possession with the intention that another, B., should be owner, and that other also had the intention of becoming owner, there was agency, and B. acquired possession through A. So, also, that possession could be retained, e.g., by a tenant. The possession might be lost through the agent (e.g., a tenant) quitting the property with the intention of abandoning it, or where an adverse claimant expelled the agent and took possession. The death of the tenant would not destroy the possession until some stranger occupied for himself.

143. *Explain the maxim: "Per extraneam personam nihil adquiri posse"; and distinguish the different ways in which rights of property could be acquired through others.*

144. *To what extent (if any) could one person acquire Dominium through or by means of another person?*

145. *A. has the usufruct of a slave belonging to B. A legacy is left to the slave. Is A. or B. entitled to the legacy?*

A Roman citizen could not, under the early law, acquire property through anyone who was not in his power or in his limited ownership (e.g., usufruct or use). Acquisition by an extraneous agent was first allowed in the case of possession, but this was not established until the time of

the classical jurists. It was fully recognised by a constitution of Severus (J. II. 9. 5). Later, when *traditio* became the universal mode of transferring ownership and possessory *dominium* had superseded the older quiritary *dominium*, such ownership could be acquired through extraneous agents (Moyle, pp. 246, 247).

A person could acquire through others in the following cases :

(1) Through free persons : (a) *in potestate* ; (b) *in manu* ; (c) *in mancipio* ; (d) *in bonâ fide possessione* : (i.e., a free person honestly believed to be a slave) but only (1) *ex re sua*=making a profit out of the property of the paterfamilias or *bonâ fide* possessor, or (2) *ex operis suis*=by such person's own labours.

(2) Through slaves : (a) *in potestate* ; (b) *in usufructu* ; but only (1) *ex re sua*, or (2) *ex operis suis* ; (c) *in usu* : but only *ex re sua* ; (d) *in nuda proprietate* ; (e) *in bonâ fide possessione*, i.e., honest possession of a slave who really belongs to another.

The owner of the *nuda proprietas* was a person entitled to property subject to a *usufruct* enjoyed by another : he could only acquire anything obtained through the slave which the *usufructuarius* could not take ; e.g., an inheritance left to the slave.

(3) Through *extranei*, only under the later law, e.g., by procurators.

B. would be entitled to the legacy, because this is not acquired through the slave's services or by the use of A.'s property.

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## IV.—LAW RELATING TO OBLIGATIONS.

SANDARS.—III., Titles 13 to end; IV., Titles 1—5.

MOYLE.—Notes to III. 14; 18; 19. 23 and 26; 20.  
6 and 8; 23; 24; 25. 9; 29; Excursus VI.  
—IX.; Notes to IV., 2; 3; 4; 5. 3.

MUIRHEAD.—Sections 31 and 53.

POSTE.—Notes to III., 128; 155—162; 209.

SOHM.—Book II., Ch. III.

MACKENZIE.—Part III., Ch. II.—IV.

## 1.—OBLIGATIONS GENERALLY.

**146.** *What are Obligations? Examine and discuss the different methods of classifying them mentioned in the Institutes.*

**Obligatio** est iuris vinculum quo necessitate adstringimur alicuius solvendæ rei, secundum nostræ civitatis iura. An obligation is a legal bond by force of which we are compelled to perform something in accordance with the laws of our state.

The Institutes classify Obligations as follows:—

(1) *According to the authority from which they derive their binding force* into (a) Civil, and (b) Prætorian.

The former were termed **civiles**, being based on the *ius civile*: the latter, **honorariæ**, as having been introduced through the edicts of the magistrates.

(2) *According to their juristic source*, into *obligationes* (a) *ex contractu*, (b) *quasi ex contractu*, (c) *ex delicto* (d) *quasi ex delicto*.

Obligations **ex contractu** were those arising from agreements made under such circumstances as to give rise to an action to enforce them.

Obligations **quasi ex contractu** were obligations imposed by law on equitable grounds in circumstances analogous to contract, but without the intervention of an agreement.

Obligations **ex delicto** were obligations arising from wrongful acts infringing rights *in rem*, the wrongdoer being bound to make compensation, or to pay a penalty, or both to make compensation and pay a penalty to the injured party.

Obligations **quasi ex delicto** were obligations arising from circumstances analogous to those giving rise to a delictual liability. They are, with two or three exceptions, cases of vicarious responsibility. Some writers, (*e.g.*, Austin and Poste) consider the distinction between obligations *ex delicto* and those *quasi ex delicto* as entirely arbitrary, and account for the separate treatment of the latter on the ground that they were introduced by the Prætor after the class of delicts had become fixed, or because they did not come within any particular statutory enactment. This criticism cannot be altogether justified. Most of the cases giving rise to obligations *quasi ex delicto* are cases of vicarious responsibility in which there is no direct *culpa* on the part of the person held responsible, and which are clearly distinguishable from delicts proper. The Roman jurists, however, have placed in the same class with these obligations arising from wrongful acts which it is difficult to distinguish from true delicts, (*e.g.*, the case of the *index qui litem suam facit*, and that of suspending objects over the public way to the common danger).

**147.** What was an *Obligatio*? Distinguish it from *Pactum*. Classify Obligations.

**148.** Define *Obligatio*.

*Justinian* says (*Inst. III.*, 13. 2) that obligations are, according to one classification, "arranged in four classes,

*contractual, quasi-contractual, delictal, and quasi-delictal."*  
 Give one example of each of these four classes. Is the classification exhaustive?

An **obligatio** is a legal bond by force of which we are compelled to perform something in accordance with the laws of our state. This bond was imposed: (a) when two or more persons made an agreement with all the necessary legal formalities (contract); (b) when the relationship between two or more persons was such that the law imposed an obligation on equitable grounds (quasi-contract); (c) when a person was responsible for a wrongful act or omission, and incurred a liability to compensate the injured party for loss, or to pay a penalty, or both to compensate and pay a penalty (delict or quasi-delict).

A **pactum** was an informal agreement between two or more persons which the law did not as a rule enforce by action, although it might operate as an equitable defence: e.g., a bare agreement not to sue.

**Pacts enforceable by action.** A few pacts, in later times, were enforced by action: (1) **Pacta prætoria**, or those made enforceable by the prætor, of which there were two; *Hypotheca* (see 115), and the *Pactum de constituto* which was an agreement to pay the debt of another in consideration of the creditor forbearing to sue him. (2) **Pacta legitima**, or those made enforceable by the constitutions of the Emperors. The most important were: *pactum de constituenda dote*, or an agreement to give a *dos*; and the *pactum donationis*, or the agreement to give something to another.

**Classification of Obligations:** (a) According to the authority from which they derived their binding force; (1) *civiles*, or those recognized by the *ius civile*, (2) *prætoriae* or *honorariæ*, or those enforced by the prætor.

(b) According to their juristic source.

(1) **ex contractu**, e.g., *stipulatio*, sale;

(2) **quasi ex contractu**, *e.g.*, *condictio indebiti*, or action to recover back money paid under a mistake of fact; *negotiorum gestio*.

(3) **ex delicto**, *e.g.*, *injuria*; *furtum*.

(4) **quasi ex delicto**, *e.g.*, the liability imposed on inn-keepers (*caupones*), ship-masters (*nautæ*) and stable-keepers (*stabularii*) for the fraud or theft of their servants.

Justinian's classification is not exhaustive. It does not include certain agreements which, in course of time, were made actionable by the Prætors or by Imperial legislation, but which were not technically classed as contracts. These were termed *pacta vestita*, and included *pacta prætoria* and *pacta legitima* (see *supra*).

**149.** *Distinguish Contractus from Pactum. Explain Pacta Vestita, Pacta Adiecta, Pacta Prætoria.*

**Contractus** was an agreement between two or more persons which the law would enforce. It involved (1) *conventio*, or agreement; (2) the *vinculum iuris*, the obligation annexed to it upon all legal conditions being fulfilled. It was "a Pact plus an Obligation" (Maine). **Pactum** or **nudum pactum** was an agreement which did not fall within the recognized contracts or within the innominate contracts, and which the law would not enforce by allowing it to be sued on, although it might be used by way of defence or set-off. Some few pacts were enforceable. (See 147—8.) **Pacta vestita**.—This term was applied to any agreements which were clothed with actions, as opposed to *nuda pacta* which were not enforceable by action. **Pacta adiecta**.—Pacts added to a principal obligation, *e.g.*, an agreement that a seller should be at liberty to rescind the contract of sale if he got a better offer before a fixed time (*in diem addictio*). These agreements were sometimes sued upon in the contract action, or were enforced in an *actio in factum præscriptis verbis*; but if the pact were subsequent to the original agreement it only availed as a defence. **Pacta prætoria**.

These were one class of pacts enforceable by action. Two examples are of importance: (a) *hypotheca*, an agreement by a debtor that certain property should be security for the creditor's claim against him; (b) *pactum de constituto*, an agreement to pay the debt of another in consideration of the creditor forbearing to sue.

**150.** "*Ex nullo pacto non oritur actio.*"

*What reservations must be made in adopting this maxim as true of Roman Law?*

Certain pacts were made enforceable by action in later Roman Law, and to these the maxim would not apply. They were termed *Pacta vestita*, i.e., pacts invested with an action, to distinguish them from *nuda pacta*, those which were not actionable. They were either *Pacta prætoria* or *Pacta legitima* (see 148 and 149).

Further, certain pacts — **Pacta adiecta** — which were accessory to some other contract, e.g., Sale, could be enforced by the action appropriate to the principal contract, if made at the same time as the principal contract.

**151.** *What do you mean by a formal contract, a unilateral contract, a bilateral contract, an accessory contract, a consensual contract, a natural obligation, a solidary obligation? Give an illustration of each from Roman Law.*

A *formal contract* was one which depended for its recognition on compliance with certain formalities required by law, e.g., the *nexum*, or the *stipulatio*.

A *unilateral contract* was one which bound one party only, such as the *stipulatio* or the contract *litteris*, which bound only the promissor, whereas in a *bilateral contract* both parties were equally bound, as in the consensual contracts and also in the case of *commodatum*, *depositum*, and *pignus*. It should be noted that the contract *mutuum* was unilateral.

An *accessory contract* was a subsidiary contract entered into to support the primary obligation ; e.g., suretyship when created by *fideiussio* and *constitutum* (see 211).

A *consensual contract* was one which was concluded merely by the expressed consent of the parties (e.g., sale, hire, partnership) as opposed to those which required either a particular formality or depended upon the transfer of the ownership, possession, or detention of a *res*, or by other act of part performance.

For *natural obligation*, see 155.

A *solidary obligation* is one which creates several obligations on the part of the debtors and separate rights in the creditors in regard to *one and the same subject-matter*, as opposed to *correality*, in which the *obligation* by which the debtors are bound, or to which the creditors are entitled, is the same.

There does not, however, appear to be any substantial ground for the distinction (see 233). Instances of solidarity occur where several have been guilty of a common delict, or where co-guardians have injured the ward, or where there are several agents, or hirers or the like, or in the case of suretyship created by mandate or *constitutum*.

**152.** *Discuss the nature of an Obligation. Was marriage an obligatio ?*

**153.** *What is the legal distinction between Dominium and Obligatio ?*

An **obligatio** confers rights *in personam*, i.e., rights that some person or persons shall do, or abstain from doing, a particular thing. In this it is distinguishable from *dominium*, which consists of rights *in rem*, i.e., rights which are available as against persons in general. E.g., A. agrees to purchase from B. a horse for a sum fixed. This is a contract of sale. A. has a right against B., and B. against A., to have the contract fulfilled, by delivery of the horse

and payment of the price respectively, But these rights only exist as between A. and B., and not between either, or both of them, and other persons. When, however, A. has the *dominium* of the horse, and B. of the price, their respective rights are changed. Each has in respect of his property rights against persons in general, or *iura in rem*. Most writers regard marriage as an *obligatio*. Ortolan contends that it was a contract *re*, because it required *traditio* of the wife. He points out that it could not be consensual because it could not be contracted between absent parties. Savigny thinks it was in the nature of a conveyance. This latter view appears to be sound, having regard to the fact that originally the marriage was made by *mancipatio*, or by delivery of the wife to the husband. Such possession gave him *manus* after one year, and without such delivery there could be no possession.

**154.** Define *Conventio*, *Contractus*, *Pactum*, *Obligatio*, *Pollicitatio*. What was imputed by the epithets *Civilis*, *Honoraria*, *Naturalis*, as applied to *Obligationes*?

**155.** Explain the meaning of *Natural Obligation*, and illustrate its effect in *Roman Law*.

**Conventio** : an agreement—the coming together of two minds. **Contractus** : a *conventio* to which the law added a *vinculum iuris*, i.e., allowed it to be enforced by action. **Pactum** : a bare agreement not enforceable by action but available by way of a defence. Some pacts were enforceable by action. (See 147—8.) **Obligatio** : the legal bond by virtue of which one is compelled by the law of his state to perform something. **Pollicitatio** : a bare proposal which is not meant to be accepted by another, e.g., a vow. A **civilis obligatio** was one which was created and enforced by the civil law. **Honoraria** was the term applied to an obligation created and enforced by the prætor or other magistrates. **Naturalis** was the term used to denote an obligation which

could not be enforced by action but was available by way of defence or set-off, *e.g.*, money paid under a natural obligation could not be recovered under a *condictio indebiti* as money not due. This obligation could be the basis of an accessory contract or of a mortgage.

## 2. CONTRACTS.

**156.** *How is the place of contract determined in the Institutes?*

By placing the subject between the law relating to things and their acquisition, and actions. Justinian followed Gaius in making a threefold division of the subjects treated; namely, persons, things, and actions. It is doubtful whether he meant contracts to fall within the second or third of these divisions, but probably the former. Neither arrangement would be strictly correct. A contract does not create a *ius in rem*, like *usucapio* or *mancipatio* or *traditio*, but only a *ius in personam* or a right against the contracting party; and an action is only a method of enforcing a right by giving damages for its breach: it does not create a right as a contract does, neither does it operate to transfer the thing which is the subject-matter of a contract.

**157.** *What classification of contracts is found in the Institutes?*

**158.** *Gaius says that the obligations arising from contract are of four kinds: aut re, aut verbis, aut literis, aut consensu.*

*Name the various contracts which come under each of these four heads.*

(1) **Re** : *Mutuum, commodatum, depositum, pignus.*  
 (2) **Verbis** : *Stipulatio.* (3) **Literis** : *Expensilatio.* (4)  
**Consensu** : *Emptio venditio, locatio conductio, societas, mandatam.*

159. What meaning do you give to the phrases "*causa civilis*" and "*nudum pactum*" in the Roman Law of contract?

**Pactum** meant an agreement simply, and was a necessary ingredient in all contracts. It was the *genus* of which contract was a *species*. A pact, of itself, was, as a general rule, not enforceable by action. Certain conditions must be complied with in order to create a *contract*, i.e., an agreement enforceable by law. These conditions, to which the term **causa civilis** was applied as being required by the *ius civile*, were of four descriptions: (1) the transfer of ownership, possession, or detention of a thing, or other act of performance by one party, giving rise to a contract *re* or to an innominate contract; (2) the expression of the agreement in a special form of words by formal question and answer, constituting a contract *verbis*; (3) the written entry of a debt in the account book of the promisee (*expensilatio*) or a written acknowledgment of debt (*chirographum*, *syngraphæ*), creating a contract *litteris*; (4) the fact of the agreement being one of a certain class of constant occurrence in business transactions, in which consent of the parties was held sufficient to create the contract—contracts *consensu*.

These were the only agreements known to Roman Law as "contracts," but subsequently other agreements were made actionable by the Prætor or by Imperial enactment. These were termed **Pacta vestita**, pacts clothed with an action, as contradistinguished from *nuda pacta*, agreements not enforceable by action, which only gave rise to a *naturalis obligatio*.

160. Speaking generally, a formless promise is not actionable in English Law unless supported by consideration. Contrast the Roman Law with this.

The Romans never evolved any general principle regarding contracts corresponding to the English doctrine of valuable

consideration. The early Roman Law, like the early English Law, only enforced contracts when the parties had complied with certain prescribed forms. Subsequently, the Prætor, on principles of equity, gave legal recognition to agreements where there had been delivery of some thing (*re*), and in time extended such recognition to all agreements where there had been performance on one side. A further step was taken when the mental element in contract, the intentions of the parties, was recognised in certain contracts of frequent occurrence, viz., the consensual contracts, effect being given to business usage (as in the case of the Law Merchant in England). The Roman Law did not go much further than this. In a few cases, from convenience or policy, agreements were made actionable, *e.g.*, hypothec, *pactum de constituto*, etc., but no general test of the enforceability of agreements was developed. The only rule that can be laid down regarding Roman Law is that an agreement to be enforceable must be referable to some *causa civilis*, *i.e.*, must be made with certain forms recognised by law, or executed on one side, or some within certain descriptions of informal agreements to which the law attached an actionable obligation.

#### 161. Describe the *Nexum*.

The **nexum** was the term used of "every transaction with the copper and balance" (*omne quod geritur per æs et libram*). This formal proceeding was used in early law for almost every purpose, *e.g.*, for conveying property; for making contracts; for making testaments; for adopting children; and for releasing from contracts. The term *nexum* when used in a special sense was applied to the earliest form of contract. The formalities were identical with those of the *mancipatio*, and involved a ceremony in which there were eight persons employed: the contracting parties, five witnesses, all above the age of puberty and Roman citizens, and a *libripens* or balance holder. The

form of words differed according to the purpose of the transaction, but the ceremony was in effect a pledge by the debtor of his person to the creditor as security for a loan.

**162.** Describe the *Stipulatio* and its chief legal effects. Was it of any advantage to have written evidence of a *Stipulatio*?

**163.** Show what historic changes occurred in *Stipulatio*, and state with exactness the effect of reducing a *Stipulatio* to writing.

**164.** Explain the term: "*Alteri nemo stipulari potest.*"

The **stipulatio** was a formal unilateral contract. The form required was a solemn question and answer: *Spondes? spondeo; Promittis? Promitto; Fideiubes? Fideiubeo; Dabis? Dabo; Facies? Faciam.* This bound the promissor; and if it were desired to bind the other side the question must be repeated by the first promissor and answered by the first stipulator. The solemn form was the binding tie, and no other consideration was necessary. It was a contract *stricti iuris*. The contract was an oral one, but was for greater security sometimes put into writing, when it was presumed to have been properly made, although the exact form of question and answer did not appear on the document. The written memorandum also raised a presumption that the parties were both present (which was essential to the validity of a stipulation). But the other party might rebut this presumption by evidence to the contrary.

Originally, the only words that could be used in making the contract were *Spondes? Spondeo*; and these were available to Roman citizens only. The other forms were subsequently introduced, and were available to others than Roman citizens. By a constitution of Leo (469 A.D.), the necessity of using a strict form of words was dispensed with, so that all that was regarded was the intention of the

parties, and if that were clear the contract was binding, whatever the words used or the form of the expression.

**165.** *Explain the division of stipulations into Iudiciales, Prætorie, Conventionales, Communes tam prætorie quam iudiciales. Give examples of each.*

**166.** *How are stipulations divided? Give examples of each division.*

**Division of Stipulations.** *Iudiciales* : those entered into on the order of a *iudex* or judge, e.g., *de dolo cautio*, security against fraud; *Prætorie* : those required by the prætor, e.g., *damni infecti*, security against apprehended damage: *Communes* : those which may be required by either the prætor or *iudex*, e.g., a stipulation by a tutor for the security of the property of the pupil; *Conventionales* : those voluntarily made by the agreement of the parties.

**167.** *What were prætorian, judicial, and common stipulations? Give instances of each of them. Is there anything analogous to these in English Law? Why has it been said that these stipulations are not contracts at all?*

See **165.**

In English Law there are what are termed "contracts of record," e.g., recognisances, which are very similar in form and operation to the judicial stipulations of Roman Law. These are not contracts, in the strict sense of the term, because they are not as a rule founded on the voluntary agreement of the party concerned.

**168.** *Give an account of the verbal contracts of Roman Law other than the Stipulation.*

*With what theories concerning the history of the Stipulation are you acquainted?*

Besides the Stipulation, there were two other verbal contracts—

(1) **Dictio dotis** was an early form of covenant to confer a dowry. It could only be used by the intended wife, her father or other ascendant, or her debtor by her express direction. It took the form of a covenant or promise, there being no interrogation. Any one else giving or promising a *dos* must transfer the property or enter into a stipulation. *Dos datur vel dicitur vel promittitur*.

(2) **Iurata promissio liberti.**

This was a verbal promise accompanied by an oath made by a freedman to his patron, promising to render certain specified services.

Sir Henry Maine, Ortolan, and other writers, derive the stipulation from the *Nexum*. According to this view, the formal ceremony *per æs et libram* fell into disuse, leaving the *nuncupatio* which took the form of *sponsio*, of which *stipulatio* was a simplified form. Dr. Hunter's criticism of this is destructive. He points out that the *nuncupatio* was not in the interrogative form, and also brings forward evidence of the extreme antiquity of the *sponsio*. It is now generally admitted that the stipulation grew out of the solemn *sponsio*, and that the latter was independent of *nexum*, but there is considerable difference of opinion as to the exact nature and derivation of the *sponsio*, although it is agreed that it is of great antiquity (see Buckler, "Contract in Roman Law," pp. 15—21).

**169.** *Classify the various grounds of invalidity of stipulations.*

**Invalid stipulations.** 1. On account of their subject-matter: (a) something that cannot exist (*e.g.*, a hippocentaur); (b) which is non-existent (*e.g.*, a slave already dead); (c) a thing *extra commercium*; (d) something which could not be acquired by the stipulator (*e.g.*, his own property); (e) the doing of an impossible or illegal act or an act *contra bonos mores*. 2. On account of the persons by whom the stipulation is said to be made: (a) dumb or deaf;

(b) insane; (c) infants; (d) absent persons. 3. On account of the persons for whom the stipulation purported to be made. One person could not stipulate for another unless he himself had an interest in the subject-matter of the stipulation; and conversely one person could not promise for another. 4. On account of the persons between whom the stipulation purported to be made: (a) master and slave; (b) father and son *in potestate*. 5. On account of the manner in which it was made: (a) parties not *ad idem*; (b) where one or both of the parties under a mistake. 6. On account of the time at which the stipulation was to take effect: (a) after death; (b) *pridie quam morior*; (c) *præpostere concepta*. (Justinian made these valid.) 7. On account of the condition, subject to which the stipulation was made, *e.g.*, an impossible or illegal condition.

**170.** Give a full account of the literal contract as it existed in the time of Gaius.

What was **nomen arcarium**?

The literal contract was apparently still employed in the time of Gaius, although probably already falling into disuse. Every Roman citizen kept his domestic account books. There was a rough day book, *Adversaria*, in which memoranda of daily transactions were inserted, and, at the end of each month his receipts and payments were entered in a cash-book or ledger, called *Tabula* or *Codex accepti et expensi*. The ordinary entries in this book were records of cash receipts and payments—**nomina arcaria**. These did not create obligations, they were only records or evidence of obligations arising apart from the entry, *i.e.*, obligations **re**. But it became the practice to make an entry of debt where no actual payment of money had been made at the time. This took the form of an **expensilatio**. It was an entry of a fictitious payment made with the assent of the other party, and operating by its own force to create an obligation. It created what, in English law, is termed an “estoppel.”

The debtor's liability arose from the entry in the *codex*, although no payment of money was directly made to him.

Hence an entry in the *codex* might be of two kinds; it might refer to an actual payment (*nomen arcarium*), or to a fictitious payment (*nomen transcriptitium*). "A *nomen arcarium* was an item entered without reference to any other person, and was devoid of legal significance; a *nomen transcriptitium* was an item entered with concurrence of both parties concerned: it was founded on agreement, and its effect was to create a legal liability." The object of the latter was to transmute an existing obligation into a literal obligation based on an entry in the *codex*, i.e., a fictitious loan. It effected a *novatio*. It was used for two purposes: (1) to effect a change in the parties to a contract (*delegatio*), a *persona in personam*; (2) to transform an existing obligation, based on another *causa*, into a contract *litteris*, a *re in personam* [see Sohm, pp. 410—415]. The *nomen transcriptitium* was a form of contract confined to Roman citizens. *Peregrini* had literal contracts of their own in the form of bonds, called *syngraphæ* or *chirographum*. These literal contracts produced a unilateral obligation *stricti iuris*, enforced, like the *stipulatio*, by a *condictio certi*.

*Nomen arcarium*, see *supra*.

#### 171. Trace the history of written contracts.

1. The *ius civile* recognised an entry made in his account book (*codex*) by the creditor with the consent of the debtor, as legally binding between Roman citizens. 2. Aliens could not thus contract, but amongst them written acknowledgments of debt termed **syngraphæ** and **chirographa**, came into customary use. These were instruments, signed in the case of the former, by both parties, and, in the case of the latter, by the debtor. 3. The literal contracts died out, and were superseded by a **cautio**, which, although not a contract, was an acknowledgment of liability which could not be repudiated after a certain time, fixed by

Justinian at two years. If, however, the creditor did not take proceedings within a reasonable time, the debtor could bring a *condictio* to reclaim the written instrument, or, if the creditor were absent, by a formal entry in the court records, he might make his *exceptio* or defence (e.g. *exc. doli*; or *exc. non numeratæ pecuniæ*) perpetual.

**172.** *To what extent was writing required in making legal contracts according to Roman Law ?*

Writing was not an essential in the making of any contract in Roman Law, except for literal contracts, which of necessity were in writing, being entries in the citizens' books. When the parties to a contract of sale agreed that the terms should be in writing, Justinian required that the document should be complete before the contract could be valid. The document was complete as soon as it had been drawn up by the parties themselves, or signed by them if written out by another, or all the formalities complied with if the instrument had been drawn up by a notary (*tabellio*).

**173.** *Define the contract of Depositum. When is it said to be Miserabile? What was the liability of the depositæe for misconduct or negligence? What penalties might a depositæe incur by using the thing deposited ?*

**Depositum**, the placing of a thing with another (*depositarius*) for safe custody, *without remuneration*, to be delivered up on request. It was **miserabile** if made under stress of circumstances, e.g., through fire or shipwreck. The depositæe was liable for gross negligence (*culpa lata*) or fraud (*dolus*) only, and not for any other kind of negligence, unless otherwise agreed. In the case of a *d. miserabile* he was liable for double value if unfaithful to his trust. The depositæe had no right, in the absence of agreement, to use the thing deposited, and such unlawful use amounted to theft.

**174.** Compare the incidents of the contracts, *Mutuum*, *Commodatum*, *Depositum*, *Pignus*, and explain the different degrees of responsibility attaching to the party in whose custody the *Res* is placed.

**175.** What were the duties incurred by the parties in contracts *Re*?

**Mutuum.**—A gratuitous loan of things consumed in their use. The borrower must return things of the same nature, quality, and quantity, and all loss fell on him.

**Commodatum.**—A gratuitous loan of a thing which must be returned *in specie*.

**Duty of borrower.**—(1) Must only use the thing for the purposes agreed upon; (2) must return the thing at the specified time; (3) must show *exacta diligentia*.

**Duty of lender.**—(1) Must allow borrower to use the thing for the time specified; (2) must pay all extraordinary expenses incurred by borrower; (3) must not knowingly lend things unsuited for the borrower's purpose.

**Depositum.**—The placing of a thing with another (*depositarius*) for safe custody, *without remuneration*, to be delivered on request.

**Duty of depositarius.**—(1) To return the thing on demand; (2) to take ordinary care; he was only liable for fraud (*dolus*) or gross negligence (*culpa lata*); (3) in the case of *d. miserabile* he was bound to exercise *exacta diligentia*, and was liable for double the value if the thing was lost through his default.

**Duty of depositor.**—(1) To recoup all expenses incurred; (2) to compensate for any loss occasioned by the thing deposited, if he was aware it was likely to cause damage.

**Pignus.**—The delivery of a thing to a creditor as security for a debt, conditionally on the creditor returning it when the debt was paid.

The creditor was bound to use *exacta diligentia* in the care of the thing pledged. He could not use it nor take the

fruits, apart from special agreement. He must restore it to the debtor on payment of the debt.

**176.** *Describe and distinguish Mutuum and Depositum irregulare.*

**Mutuum** was a loan of fungible things for consumption, the property passing to the borrower under an obligation to return things of equal quantity and quality.

**Depositum irregulare** closely resembled *mutuum*. It occurred when *res fungibiles* were deposited under an agreement that the depositary should become owner, and should only be bound to return things of equal quantity and quality. The things deposited were at his risk, and he could use them. The two transactions differed only in the intention of the parties. *Mutuum* was a contract in the interest of the borrower. *Depositum irregulare* was made in the interest of the depositor. The legal consequences of the two contracts differed materially. In *mutuum* interest could only be charged if expressly stipulated for. The *actio depositi* being *bonæ fidei*, interest could be recovered in the case of *depositum irregulare* under the agreement or where there was delay in payment. The most usual case of *depositum irregulare* was money deposited with bankers.

**177.** *Define mutuum. If interest were to be paid in connection with a money loan, what formality should be resorted to? Do you know of any special rules of Roman Law relating to interest?*

**Mutuum.** See 175 and 176.

Interest was only payable where there was a special stipulation to pay interest. In a few exceptional cases an agreement to pay interest might be enforced even when made by informal pact, e.g., in loans by municipalities.

By the XII. Tables, interest was limited to twelve per cent (*unciarium fœnus*). Subsequently it appears to have

been reduced to six per cent. (*semiunciarium fœnus*). The *Lex Genucia* (about B.C. 340) prohibited it altogether. This law, however, was clearly disregarded, for in the time of Cicero the recognised maximum was twelve per cent. Justinian fixed certain maximum rates of interest, viz., twelve per cent. for maritime loans; eight per cent. for business loans; six per cent. for ordinary loans. He also provided that interest should not be recoverable to a greater amount than twice the amount of the principal. Compound interest was forbidden by the *ius civile*. This had been evaded by stipulating that interest should be added to the principal and so carry interest. Justinian strictly prohibited the exaction of compound interest.

178. Give examples of *Innominate contracts*. To which of the four classes have they been assigned, and why?

**Innominate contracts** were certain agreements which did not fall within any of the ten recognized forms of contract, but were enforced by law provided that one of the parties had done all that he agreed to do. They were based upon part performance, and were, therefore, closely allied to contracts *re*. They fell under four heads: *do ut des*; *do ut facias*; *facio ut des*; *facio ut facias*. Examples: A. agrees to plough B.'s field on condition that B. ploughs A.'s. A. and B. have each a horse, and they agree that each shall have the use of the other's horse in alternate weeks.

179. Show by examples the meaning of *Innominate contracts*. To what extent was the doctrine of valuable consideration recognized by the Roman Law?

A. agrees to plough B.'s field on condition that B. ploughs A.'s field in return. A. agrees to give B. a horse in exchange for two oxen. Neither of these arrangements falls within the ten regular forms of contract recognized by the Roman Law, namely, the verbal, the literal, the four real, and the

four consensual contracts. At the same time, if A. performed his part of the bargain it was only just that B. should be compelled to perform his part, and the law required him to do so. Performance by one side was, therefore, the consideration for the performance by the other, and since there was no special name applicable to such contracts they were called **innominati**. They most nearly approached contracts *re*.

The Roman lawyers never developed a general principle in relation to contract similar to that of the English doctrine of consideration. They came very near it in giving validity to the consensual contracts, and, in fact, valuable consideration was an essential element in these contracts. But they failed to seize on this element as a general test for the validity of all informal contracts. All they accomplished was to make certain agreements enforceable which, owing to their common occurrence or to mercantile custom, or on grounds of policy, it was found expedient to recognise as binding. The only general test relating to contract which they laid down was the empirical test of *causa*. See 160.

**180.** *What were the essentials of the contract Emptio et Venditio?*

The essentials of this contract were (1) a definite and unconditional agreement between the parties as to the thing to be sold, and (2) as to the price to be paid. No formality was necessary nor was part performance essential. Justinian, however, enacted (Inst. III. 23, pr.) that where the parties had agreed that the contract should be reduced to writing, it should not bind the parties until so completed.

**181.** (a) *At what moment was a contract of sale complete in Roman Law?*

(b) *What was the nature of the performance to which the vendor was then bound?*

(c) *Were there any cases in which the risk (periculum) remained with the vendor until delivery?*

(d) *At what moment did the ownership pass to the buyer?*

(a) The contract was complete as soon as the price was fixed, either by the parties or by a third person to whom the determination thereof had been referred.

(b) The vendor's duties were: (1) to deliver lawful and undisturbed possession; (2) to take due care of the property pending delivery; (3) to guarantee undisturbed possession, and compensate the purchaser if evicted; (4) to warrant against secret faults. If such were discovered the vendor might be sued within six months for rescission of the contract (*actio redhibitoria*) or within a year for a reduction in price (*actio aestimatoria*).

See also 182.

(c) The risk of the property (*periculum rei*) passed to the buyer immediately the contract was complete, except in three cases where it remained with the seller: (1) things sold by number, weight, or measure, until they were ascertained and appropriated to the contract; (2) things sold under a condition, until the condition was fulfilled; (3) where the buyer had the choice of two things; but, if both were destroyed, the loss fell on the buyer.

(d) The ownership passed upon delivery if the price had been paid, or security taken for payment, or credit allowed. Otherwise it did not pass until payment of the price.

**182.** *Describe the rights which a buyer acquired by the contract of sale. What was necessary to transfer the ownership of the thing sold to the buyer? After the contract of sale, upon whom did the loss fall if the thing sold were destroyed or damaged?*

**Rights of the buyer.—Liability of seller.** In the absence of special agreement, the rights conferred by law

on the buyer, and the obligations imposed on the seller, were as follows :

1. The seller must deliver the thing to the buyer with its appurtenances. The buyer must be put in actual possession so as to enable him to hold the property as his own, and in the event of his being deprived of it by some one with a better title than the seller, he must be indemnified by the latter. In the case of incorporeal things incapable of delivery, protective covenants were substituted for delivery.

2. But the seller was under no obligation to give a title as owner, and the buyer could not refuse to take delivery on discovering that the property was not that of the seller. The seller was only bound to give undisturbed (*vacua*) possession.

3. Pending delivery the seller must take due care of the property pending delivery : he must exercise the care of a *bonus paterfamilias*. He was discharged of this liability of *exacta diligentia* if the buyer wrongfully delayed acceptance, and he then became liable only for wilful misconduct or gross negligence.

4. Delay in delivery entitled the buyer to any damages consequent thereon.

5. The seller must guarantee quiet enjoyment, *i.e.*, undisturbed possession. But to make the seller liable (1) there must have been lawful eviction by a third person, and the flaw in the title must have existed at the time of contract ; (2) the eviction must not have been attributable to the buyer's own fault or negligence ; (3) the seller must have notice that the title is contested. This liability was always subject to terms in the contract affecting it. The measure of damages on eviction was the market value of the property at the time of eviction.

6. As to the warranty against secret faults ; and gross inadequacy of price, see 184.

**Transfer of ownership.**—The ownership was not transferred until the price was paid. If delivery was made before payment, no intention to transfer the ownership was implied until payment, but if credit was to be given the delivery of the property did transfer the ownership, it being supposed that the seller had elected to substitute a right *in personam* as against the buyer for his right *in rem* to the thing.

**Periculum.**—As a general rule the risk passed to the buyer as soon as the contract was concluded, and he would bear any loss that was not occasioned by the negligence of the vendor. The profit also went to the buyer. To this general rule were three exceptions: (a) the risk of things sold by measurement remained with the seller until they were measured, unless they were sold as a lot; (b) if the thing were sold on a condition, then if the condition was not fulfilled, the loss fell on the seller; but if fulfilled, and before fulfilment loss incurred, total loss fell on the seller, partial on the buyer; (c) in a sale of one of two things, at the option of the buyer, the loss fell on the seller if one was destroyed, and on the buyer if both were destroyed, *i.e.*, he had to pay the stipulated price but got nothing.

**183.** Give an account of the legal position of a purchaser (a) after the contract of sale has been entered into but before delivery, (b) in the period between delivery and payment.

(a) The property does not pass until delivery, and not even then unless the price is paid or security taken or the seller agrees to give credit. If the subject-matter is specific the risk is on the buyer, but the seller is obliged to use exact diligence in the custody thereof unless the buyer is chargeable with delay (**mora**) in taking delivery, in which case he is only liable for fraud or gross negligence. The buyer is bound to pay any necessary expenses incurred by the seller in keeping the subject-matter, *e.g.*, medical

charges incurred in curing a slave. He is also liable for interest if he is chargeable with delay in completing the contract.

(b) In the absence of agreement to the contrary, the buyer must pay interest on the price from the time of delivery. He can rescind the contract within six months if he discovers some secret defect in the thing sold (**actio redhibitoria**) or he can set off the damage in diminution of the price. If he is evicted from the possession of the thing sold, he can refuse payment of the price and also claim any damage suffered.

**184.** *In the Roman Law of sale (a) what was **læsio enormis**? (b) Was there an implied warranty of quality?*

**185.** *Did the maxim "**Caveat Emptor**" apply in mature Roman Law?*

**Læsio enormis** was the grievance which a vendor suffered when the price agreed upon was less than half the true value of the thing sold. In such a case he had the right of rescinding the sale unless the purchaser would pay so much more as would make the price a fair one. Traces of this right applied to cases of special hardship are to be found in constitutions of earlier Emperors, but in the code of Justinian it is regarded as of general application. The remedies of the vendor were by *exceptio*, and, according to most authorities, the action *ex vendito*. In three cases a contract could not be rescinded on the ground of *læsio enormis*: (1) if by a term in the contract the vendor expressly waived the right; (2) if the purchase was an *emptio spei*; (3) where the vendor, selling the property at an undervalue, was merely obeying a direction in a will under which he was heir or had benefited. If the vendor acted with his eyes open the possibility of rescission was doubtful.

**Implied warranty of quality.**—A warranty of quality was implied in every contract of sale, as to defects subsequently discovered and which could not have been discovered on examination at the time. In early law this warranty only existed in the case of fraud or express representation. The *Ædiles*, by their edicts, at first compelled the vendor of slaves at any time within two months from the date of contract, to enter into a stipulation, on demand, against certain defects, and if refused, the purchaser might recover his money on returning the slave. Subsequently, a right of rescission by *actio redhibitoria* was given within six months of the date of contract. Another step was taken when, in the case of *iumenta*, the vendor was bound to disclose *all* defects under the penalty of having the contract rescinded (*redhibitio*) within six months, and the purchaser was given alternatively a right within twelve months to a fair reduction of price (*actio quanti minoris*). Later still, this new remedy was made applicable to the purchase of slaves and all beasts included in the term *pecus*.

By juristic construction under the Empire, further extensions were made until an implied warranty of quality was implied on every sale. Consequently, the maxim *Caveat Emptor* did not apply in mature Roman Law.

It was the duty of the vendor to disclose defects. Ignorance of them did not relieve him, but knowledge of them rendered him liable in an *actio ex empto* for all loss sustained, and in this case an express agreement that he should not be liable would not protect him.

The remedies of the purchaser for a breach of this warranty were :

- (1) *Exceptio*, when sued for the purchase money ;
- (2) *Actio redhibitoria*, brought within six months of the date of the contract for rescission ;
- (3) *Actio quanti minoris*, or *æstimatoria*, brought within twelve months for a reduction in price proportioned to the defects ;

(4) *Actio in factum*, where the vendor had received back the property but refused to refund the money ;

(5) *Actio ex empto*, to enforce any obligation arising from the terms of the contract.

**186.** *How far would the following propositions of the English Law of Sale of Goods apply to the Roman Law ?—*

(a) *If no price is named, a fair price is understood.*

(b) *Neither buyer nor seller has any remedy merely because the price is excessive or inadequate.*

(c) *There is an implied condition on the part of the seller that he has a right to sell the goods.*

(d) *The goods remain at the seller's risk until the property therein is transferred to the buyer.*

(a) Roman Law knew nothing of a "reasonable price" or a price presumed to have been meant but not expressed. No obligation arose until the price was fixed.

(b) Generally, parties were left to make their own bargain as to price, but in certain circumstances relief was given if the price was grossly inadequate on the ground of *lesio enormis*. See **184**.

(c) There was no such implied condition in Roman Law. The seller was only under an obligation to guarantee quiet possession. See **182**.

(d) In Roman Law the risk passed to the buyer, as a general rule, immediately the contract was concluded. For exceptions, see **182**.

**187.** *De Villiers, C.J., recently asked the following question when hearing a case in the Supreme Court of Cape Colony : "If a few shillings would repair the defect, is the actio redhibitoria maintainable? Should not the actio quanti minoris have been brought?"*

*Distinguish these actions, saying what you know of their origin. What other remedies were open in Roman Law to a defrauded purchaser?*

These actions were introduced by the *Curule Aediles* to enforce the warranty against undisclosed faults which they implied in contracts for the sale of slaves, horses, and cattle in the Roman markets, over which they had jurisdiction. The implied warranty was subsequently extended, in the classical period, to all sales.

The **actio redhibitoria** was available only within six months from the date of the contract, and was brought when the object of the plaintiff was to cancel the contract and recover the purchase-money.

The **actio quanti minoris** or **æstimatoria** was available at any time within a year, and enabled the plaintiff to claim a reduction in the price in proportion to the defects complained of.

Besides these remedies the buyer had the *actio empti* under which he could recover the price if evicted, or compensation for the breach of contract. He had also the *actio ex stipulatio* to enforce any stipulations which he made to secure himself; in later days, most of such stipulations were implied by custom.

**188.** *Explain the difference between Exchange and Sale.*

The controversy as to whether the price in a contract of sale could be anything but money was terminated by a rescript of Diocletian and Maximian, enacting that an agreement to exchange one thing for another, instead of for money, was not binding on either party until there had been performance on one side accepted by the other. **Permutatio** thenceforth was an innominate contract enforceable by an *actio præscriptis verbis*. The liability of each party for undisclosed defects in the article was extended to the contract of exchange.

In three particulars exchange and sale differed :

(1) In sale a purchaser could not rescind the contract because the vendor had in fact no right to sell the subject-matter ; but it was essential to exchange that each party should vest in the other the property in the article which he conveyed.

(2) In sale the property was, as a rule, at the risk of the purchaser from the time the contract was concluded ; but not so in exchange.

(3) In exchange the property passed on delivery, and before counter-performance by the other party ; in sale it passed only if in addition to delivery the price was paid, unless there was an agreement to allow credit.

**189.** *Distinguish between the legal effects of the contract of barter and the contract of sale in Roman Law.*

*A few years ago X., a trustee, contracted to sell to Z. a certain estate under a power of sale. It turned out, however, that he had not the power of sale until the death of Y., the tenant for life. Z., in consequence refused to complete the purchase, although Y. was willing to join in an immediate conveyance. The court held that Z. was right (In re Bryant's Contract, 44 Ch. D.). Would this decision agree with the Roman Law conception of the contract of sale?*

(1) Barter, in Roman Law, was an innominate contract, and did not give rise to an obligation until one party had performed what he had promised. Sale was a consensual contract, and the parties were bound as soon as they had come to an agreement.

(2) In barter, the parties were obliged to transfer the ownership of the things exchanged. In sale, on the other hand, there was no obligation to transfer the ownership of the thing sold ; the seller was only obliged to warrant against eviction, *i.e.*, to give quiet possession.

The decision would not be in accordance with the Roman law of sale. X. was able to give quiet possession

of the estate, and the contract would have been binding on Z.

**190.** *Titius sold a slave, Stichus, to Mævius for twenty aurei, and agreed to deliver the slave on or before January 1st. At the time of the agreement, although the fact was not known to Titius or Mævius, the slave suffered from a serious illness, which terminated fatally before January 1st. Can Titius sue Mævius for the price? Would you give the same answer if the question were in all points the same except that Mævius instead of paying a sum of money agreed to give something in exchange?*

Titius can sue for the price because the risk passed to Mævius immediately the contract was made.

In the case of an agreement to give something (other than money) in exchange for the slave the contract would be **permutatio**. The law imposed no obligation in exchange until the one side had performed his part. Until, therefore, Titius had delivered the slave he would be unable to sue Mævius for performance of his part of the contract.

**191.** *Distinguish the Contract of Sale from the Contract of Hire, and from Emphyteusis.*

**192.** "So nearly akin," says Justinian, "is purchase and sale to letting and hiring, that in some cases it is a question to which class of the two a contract belongs"; and as an instance he refers to the contract of *Emphyteusis*.

Point out the features in which *Emphyteusis* resembled sale and hire respectively, and give a general account of the legal position of a person holding land under this contract.

The contract of hire of a thing (*locatio conductio rei*) is the letting another have, for a pecuniary consideration, the use and fruits of a thing which one has in one's *de facto*

possession, and it is distinguished from sale in that the latter has no intention of parting permanently with his own interest.

In the case of *locatio conductio operis faciendi* one man employed another at a fixed remuneration to make something out of materials belonging to, or to be procured by, the employer. When the person engaged also supplied the materials, the general opinion in the time of Gaius was that this amounted to a Sale, and such was the law under Justinian. English law is the same on this point [see *Lee v. Griffin*, 30 L. J. Q. B. 252].

**Emphyteusis** resembled Sale in that the *emphyteuta* obtained permanent possession of the thing (subject, however, to forfeiture if the quit-rent was not paid for three years). It differed from Sale, and resembled Hire in that an annual rent was payable. The *emphyteuta* was not owner as he would have been had the contract been one of sale. Neither was he a hirer merely, for he had rights *in rem* which the hirer never possessed. He had possession protected by interdict. The controversy as to the nature of *emphyteusis* was settled by the **lex Zenoniana**, which constituted the *emphyteusis* a distinct contract governed by its own special rules (see 111).

**193.** *What were the rights of a vendor in the absence of special agreement? Mention the principal characteristics which distinguish the Roman from the English law of Sale.*

**Rights of Vendor.**—(1) To payment of the price; (2) to interest on the unpaid price from time of delivery; (3) to be reimbursed any expenses incurred in keeping the thing sold prior to delivery.

**Roman and English Law of Sale.**—(a) In Roman Law mere consent was sufficient to create the contract if the price were fixed. In English Law certain contracts of sale, namely, for the sale of goods of the value of £10 and upwards, are not enforceable unless there be part payment or earnest

given, or "acceptance and receipt," or some written memorandum of the contract. Further, the price need not be fixed, a reasonable price being implied if none be specified. Contracts for the sale of *land* are governed in English law by special rules, written evidence being usually necessary. (b) In Roman Law the risk passed as soon as the contract was made, though the property in the thing did not pass until delivery and payment of the price (unless credit were given). In English Law the risk and property pass together. The rule is that if the goods be ascertained and ready for delivery the property passes at once; but if otherwise the property does not pass until the goods have been ascertained and the purchaser has notice thereof. The maxim **res perit domino** applies. (c) In Roman Law the contract implied a warranty *vacuæ possessionis*, i.e., the seller did not undertake to give the property, but only to secure to the buyer the uninterrupted possession of it. In English Law a warranty of title is usually implied. (d) In Roman Law a warranty against secret faults was implied. In English Law **caveat emptor** is the general rule, though there are several exceptions to this.

**194.** *Distinguish Locatio Conductio Rei, Locatio Conductio operarum, and Locatio Conductio operis.*

*What, in the absence of express agreement, were the duties of a Conductor and a Locator Rei?*

*L. C. rei* was the letting by one and the hiring by another of a corporeal thing, moveable or immoveable, or of an incorporeal thing, such as a usufruct.

*L. C. operarum* was the letting by one person of his services alone to another. The employee was the *locator*, the employer the *conductor*.

*L. C. operis* was the contract by which one undertook to execute some work; in this case the person who did the work was called and regarded as the hirer (*conductor*) of the job, whilst the employer was the *locator* or letter of it.

**Duties of Locator.**—(1) To deliver the thing to the *conductor*; (2) to guarantee him against eviction, occurring by any fault of the *locator*, for the time agreed; (3) to warrant the fitness of the thing for the purposes for which it was let; (4) to keep the property in necessary repair for the purposes of enjoyment; (5) to permit fixtures to be removed, provided no damage be done; (6) to compensate the tenant for unexhausted improvements.

**Duties of Conductor.**—(1) To take reasonable care of the property; (2) to pay the rent for the time agreed on; (3) to give up the property at the end of the term.

**195.** *Mention any instances in which there was a controversy as to whether the contract was Emptio Venditio or Locatio Conductio, and state in each case what was finally decided.*

(1) **Emphyteusis.**—The dispute was finally settled by an enactment of *Zeno*, which constituted it a contract *sui generis* (see 111).

(2) Where the employee was engaged to make a thing, supplying his own materials. This was ultimately held to be a sale (following the opinion of *Sabinus*).

**196.** *What were the reciprocal obligations of landlord and tenant upon the hire of a farm or house?*

**197.** *A. hires a house from B. What are the respective duties of A. and B.?*

**Duties of Landlord.**—To deliver the tenement to the tenant and to allow him to keep it for the agreed time; (2) wrongful eviction by the landlord entitled the tenant to compensation; (3) eviction by no fault of the landlord gave the tenant a remission of rent but no damages; (4) to keep the place fit for use, or otherwise to allow a reduction of the rent; (5) to warrant the fitness of the place and its stock; (6) to allow the removal of fixtures so long as the

tenant did no damage; (7) to compensate for unexhausted improvements.

**Duties of Tenant.**—(1) To pay the rent, with interest on arrears. The tenant might be evicted if the rent were in arrear for two years; (2) To pay the rent for the whole term; (3) to exercise due care; (4) to give up the place on the expiration of the term; (5) to do trifling repairs.

**198.** *A. grants the usufruct of a farm to B. for twenty-five years. C. hires a farm from A. for twenty-five years. Compare the legal position of B. and C.?*

B. (the *usufructuarius*) takes the use, and fruits of the farm if and when he actually gathers them, and also the produce and young of the animals. The instruments of husbandry were included unless the contrary were stated. He could cut stakes for his vines, etc., and could cut undergrowths and pollards; could work quarries, mines and pits. He could not alter the structural character of the buildings, but he could take the rents if the property were not already let when he entered. He could not alienate the usufruct, though in later law he might allow another to enjoy it in his name. He was bound to use the property as a *bonus paterfamilias*; to do ordinary and moderate repairs; and to pay the taxes. The owner could not interfere with the property whilst the *usufructuarius* held it. The *usufructuarius* had a servitude, a real right over the thing. There was an interdict for protection of his possession.

C. (the *colonus*), had to take all reasonable care of the farm; to pay his rent; to give up possession at the end of the term; to cultivate the farm according to the contract. He could sub-let. A. was bound to let C. hold the farm for the term agreed; to pay compensation if through his fault C. were evicted, or to allow remission of rent if the eviction took place through the action of another; to keep the farm in such a state that C. can enjoy it; to warrant against faults likely to cause damage; to allow C. to remove fixtures

without doing damage; and to compensate for improvements. The *conductor* had only a personal right against the *locator*. If evicted, he had only an action *in personam* for damages against the *locator*.

**199.** *What were the requisites of the contract locatio conductio? How did it differ from Emphyteusis? How was the liability of a lessee of a house affected if the house was accidentally burnt down? What were the remedies of the landlord if rent was in arrear?*

See **194.**

*Locatio conductio* differed from Emphyteusis in the following respects :

I. *Locatio conductio* was a letting for a fixed period, usually five years; *Emphyteusis* was a lease in perpetuity.

II. *Locatio conductio* gave rise to rights *in personam* only; Emphyteusis also conferred rights *in rem*.

III. The *conductor* did not have "possessio"; the emphyteuta was "possessor" and was protected by interdict. Consequently, if the conductor were evicted, his only remedy was to sue the *locator* for damages; but if the emphyteuta were evicted he could recover possession.

IV. The *conductor* was entitled, in the absence of agreement to the contrary, to a remission of rent in certain cases, *e.g.*, loss or damage to crops; the emphyteuta was only released from liability to pay the quit-rent by the total destruction of the land.

If the house was accidentally burnt down, the lessee was discharged from liability to pay rent after the fire [D. 19. 2. 30. 1].

For rent in arrear the landlord had the *actio locati* to recover the arrears. He also had an implied hypothec over all things brought on to the premises for use (*in vecta et illata*). If there was great delay in paying the rent, he could evict the tenant.

200. Define *Societas* and state its incidents.

201. Enumerate and distinguish the several kinds of partnership. In the absence of special agreement, what rights and liabilities were implied by law as between partners?

In what manner did the position of a partner under Roman Law differ from that of a partner in English Law?

**Societas** was a contract whereby two or more persons agreed to combine their property, or property and labour, with the object of sharing amongst themselves the gains.

Five kinds of partnership are mentioned by Justinian :

I. *Universorum bonorum*, universal partnership, involving community of property of every description ;

II. *Universorum quæ ex quæstu veniunt*, trade or business partnership, partnership in all things acquired through business transactions ;

III. *Negotiationis alicuius*, partnership confined to a particular transaction, e.g., a single sale.

IV. *Vectigalis*, for the purpose of farming the revenue, a variety of III. but governed by special rules.

V. *Rei unius*, in relation to a single thing, i.e., joint ownership, when arising from agreement.

**Rights and liabilities.**—Each partner must contribute his share of capital or labour ; must show ordinary diligence, i.e., the diligence he observed in his own affairs (*quanta in suis rebus*) ; must account for all acquisitions made in the course of the partnership business ; must reimburse his partner his share of all necessary expenses. In universal partnership, each partner was under an obligation to bring all his property and acquisitions of every description into the common stock ; in fact, they passed by virtue of the contract. In the absence of special agreement, profits were divided equally ; an arrangement by which a partner should bear all loss, but took no share in the profit, was termed **leonina societas**, and was invalid.

As regards dealings on behalf of the partnership with third parties, Roman Law did not recognise a partner as having authority to bind the other partners. It only dealt with partnership so far as the relations of the partners *inter se* were concerned. In transactions with third parties on behalf of the partnership, only the partner acting acquired rights, or was bound, as the case might be ; although he could claim indemnity from loss from, and would have to account for gains made to, his co-partners. In this respect Roman Law differs from English Law. In English Law every partner is the implied agent of the partnership within the scope of the partnership business.

**202.** *Define Mandatum. In what different methods could the contract be framed ?*

**203.** *Describe the powers and duties of the Mandatarius. How was the contract terminated ?*

**Mandatum** was a contract in which one party agreed to do something for another *gratuitously*, and the other agreed to indemnify him against loss. It might be for the benefit of : (a) the mandator alone ; (b) both parties ; (c) a third person only ; (d) a *mandatarius* and a third person.

**Duties of the mandatarius.**—(1) To do what he undertook to do ; (2) to abide by his instructions ; (3) to show *exacta diligentia* ; (4) to account for anything received.

**Duties of the mandator.**—(1) To pay necessary expenses ; (2) to accept what the *mandatarius* had obtained ; (3) to indemnify the *mandatarius* against all obligations into which he had been obliged to enter.

**Termination of mandate.**—(1) By the death of either party, but a mandate executed in ignorance of the death of the mandator was valid ; (2) by revocation ; (3) by renunciation.

**204.** *For what purposes was the contract of Mandatum employed?*

I. To supply the defect which existed in Roman Law through the absence of a proper system of agency. Roman Law did not allow a person to be represented by another (other than a slave or a person in his *potestas*) for the purpose of making a contract or performing other legal acts governed by the *ius civile*. This might, however, be indirectly effected by *mandatum*; but the person gratuitously doing the act was obliged to do it in his own name, and was personally bound. His protection lay in the duty, which was imposed by law on the *mandator*, to indemnify the *mandatarius*.

II. To create suretyship, *mandatum qualificatum*, e.g., where A. requested B. to lend money to C. The law implied a promise by A. to indemnify B. against loss, so that A. was a surety.

III. In later law, to transfer the benefit of a debt or other obligation, the assignee being given a mandate to sue in the assignor's name (*procurator in rem suam*).

**205.** *Define contracts Emptio Venditio, Locatio Conductio, Societas, and Mandatum.*

**Emptio venditio.**—A contract by which one person agreed to deliver another a thing (*merx*) for a price fixed or to be ascertained.

**Locatio conductio.**—A contract by which one person (*locator*) agrees to give to another (*conductor*), the use of something, or to do some work, in return for a fixed money payment.

**Societas.**—A contract by which two or more persons agreed to combine their property, or one to contribute property and another labour, with the object of sharing amongst themselves the gains.

**Mandatum.**—A contract in which one party agreed to do something for another *gratuitously*, and the other agreed to indemnify him against loss.

**206.** Consider whether the following propositions of English Law were true of Roman Law :

- (a) "The contract of sale of personal chattels is also a conveyance thereof."
- (b) "The pawnee has a right to sell the goods pawned on non-payment of the debt."
- (c) "Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not."
- (d) "In English Law a lessee ejected by a trespasser has long been able to sue the trespasser for recovery of possession."

(a) The contract of sale in Roman Law did not convey the property. It only created a right *in personam*. See 182.

(b) The pawnee in Roman Law, prior to the legislation of Justinian, had no right of sale apart from express agreement, and a sale in the absence of such agreement would have amounted to theft. Justinian enacted that the creditor might sell on default being made for two years after notice to repay.

(c) In Roman Law, as a general rule, the risk passed to the buyer immediately the contract of sale was concluded, although the property was not transferred until delivery and payment of the price (unless credit were given). For the exceptions, see 182.

(d) In Roman Law the lessee (*conductor fundi*) had only rights *in personam* against the lessor (*locator*). He could not claim to recover possession, his only remedy was to claim damages for eviction.

**207.** Explain the legal position of Mævius in each of the following cases : Mævius agrees to let Titius have the use of a team of oxen for two days (1) for whatever sum may be fixed as fair and reasonable ; (2) for whatever sum may be fixed as reasonable by Seius ; (3) in consideration of Titius promising to lend him a similar team next week ; (4) in consideration of six flasks of wine, which Titius gives him then and there.

(1) The *merces* or hire-money in a contract *locatio conductio* was required to be ascertained and fixed either by the parties or some agreed third person ; consequently in this case there was no valid contract : but if Mævius did in fact let Titius have the team as promised, he would, at least in later law, have an *actio in factum præscriptis verbis* to recover damages under the innominate contract (*facio ut des*).

(2) This would be a valid contract of letting and hiring as soon as Seius fixed the amount to be paid.

(3) This was an innominate contract which Mævius could enforce by an *actio in factum (civilis)* if he let Titius have the team ; otherwise neither party would be bound.

(4) Mævius would here be bound to perform his agreement (innominate contract).

**208.** Stichus, a slave belonging to Julius, deposits plate with Seius. Seius gives up the plate to Gaius honestly believing that Gaius is the owner of the slave. Can Julius sue Seius to recover the value of the plate ? Would it make any difference to the answer if Seius made a charge for looking after the plate ?

Being gratuitous, the contract was *depositum*, and Seius would not be liable, having acted honestly. If a charge were made, the contract would be *locatio conductio*, and Seius would be liable, because it was his duty to give up the thing to the owner, and to show *exacta diligentia* in all his dealings with it.

**209.** *What, if any, special legal effects were connected with the reduction to writing of (1) a stipulation, (2) a contract of sale, (3) a hypothecation?*

(1) A stipulation reduced to writing—

(a) was conclusively presumed to have been made in the form of question and answer;

(b) gave rise to a presumption that the parties were present, the burden of proof being thrown on the person asserting the contrary.

(2) In a contract for sale, where it had been agreed that the contract should be expressed in writing, it did not bind the parties until so expressed.

(3) By a constitution of Leo (Cod. 8. 18. 11) priority was given to hypothecations made in writing by an instrument *publice confectum*, i.e., before a magistrate or public notary, or witnessed by three persons of good reputation.

**210.** *Illustrate from the Roman Law of Contract (a) the principle of Part Performance, (b) the use of Implied Warranties.*

(a) The principle of Part Performance is illustrated by the contracts *re* and the innominate contracts.

(b) Implied Warranties are found in the case of Sale and Hire, e.g., the warranty against secret defects (enforceable by the actions *redhibitoria* and *æstimatoria*), and the warranty against eviction.

### 3. ACCESSORY CONTRACTS.

**211.** *Enumerate and compare the different modes in which the contract of suretyship might be constituted.*

**212.** *Describe Mandatum and Constitutum as modes of creating suretyship.*

**Creation of suretyship.**—1. By *Stipulatio*. (a) *Sponsio*, a form of stipulation confined to Roman citizens. It could

be made accessory to verbal contracts only. (b) *Fidepromissio*, a form of stipulation accessory to verbal contracts only, but available to persons other than Roman citizens; (c) *Fideiussio*, also a form of stipulation open to anyone. It could be made accessory to every kind of obligation, civil or natural.

2. By mandate. If A. lent money to B. at the request of C., there was an implied contract on the part of C. to indemnify A. against loss through B. not paying.

3. By *pactum de constituto*, or an agreement to pay the debt of another in consideration of the creditor forbearing to sue that other. This was one of the few *pacts* which were enforceable by action.

**213.** *Enumerate the modes in which a contract of suretyship could be formed and distinguish their effects.*

See 211.

**Sponsio** and **fidepromissio** did not bind the heirs of the surety; the surety was discharged after two years by the *lex Furia* (B.C. 95): the surety was only liable for his share (*ib.*); the surety had a right of contribution by the *lex Apuleia* (B.C. 102). These forms were accessory to verbal contracts only; the former could be made only by Roman citizens, the latter by aliens also. The effects of **fideiussio** were: that the heirs were bound; the surety's liability was not limited as to time; he was liable for the whole debt until Hadrian introduced the *beneficium divisionis*; there was no contribution until the introduction of the *beneficium cedendarum actionum*. Justinian introduced the *beneficium ordinis, excussionis, or discussionis*, making the creditor sue the principal debtor first, and allowing him to go against the sureties for the balance unpaid. The effect of suretyship by mandate was to make the surety liable only on the loan being actually made, and until that time the *mandator* might withdraw. The liability on *mandate* and *constitutum*

was unlimited as to time, and extended to the whole debt as in *fideiussio*; the various *beneficia* also applied to these forms of suretyship.

**214.** *In what ways could a man make himself liable for the obligations of another?*

1. By *stipulatio*: (a) *sponsio*; (b) *fidepromissio*; (c) *fideiussio*. 2. By *mandate*: e.g., A. asks B. to lend money to C. There was an implied contract of indemnity on the part of A. to B. 3. By *pactum de constituto*: an agreement to pay the debt of another in consideration of the creditor not suing that other.

**215.** *What were the provisions of the Sc. Macedonianum and the Sc. Velleianum?*

**216.** *In 1884 a case (Oak v. Lumsden, 3 Juta Rep. 144), was before the Courts of the Cape of Good Hope, in which the defence was that the defendant, a married woman, was entitled to the benefit of the Senatusconsultum Velleianum.*

*What was the benefit in question, and by what methods could it be claimed in the time of Gaius? How did Justinian alter the law on this subject?*

The **Sc. Macedonianum** (temp. Claudius, according to Tacitus; temp. Vespasian, according to Suetonius) enacted that no action should be brought to recover money lent without the consent of the father to a person under *potestas*.

The **Sc. Velleianum** (A.D. 46) provided that no obligation entered into by a woman on behalf of another person (*intercessio*) should be binding.

In the time of Gaius the usual method of taking advantage of the Sc. was to plead it by way of *exceptio* or defence; but if the money had been paid, it could be recovered by a *condictio indebiti*.

In certain exceptional cases, however, an action was allowed, e.g., where the woman was party to a fraud, or the *intercessio* was for valuable consideration.

Justinian enacted that no *intercessio* by a woman (except where made for valuable consideration or with reference to her *dos*) should be valid unless constituted by a public instrument signed by three witnesses. He also enacted that any *intercessio* by a wife for her husband (with a few exceptions) should be absolutely void.

**217.** *Explain briefly how far the principles of (a) Subrogation, (b) Contribution, existed in the Roman Law of suretyship.*

(a) The surety, on satisfying the creditor's claim, could require the transfer to himself of the creditor's rights of action, and all securities held by the latter. This was termed the **beneficium cedendarum actionum**. He was, in fact, subrogated to the rights of the creditor.

(b) When there were several sureties, a surety sued by the creditor could require the claim to be divided amongst such of the sureties as were solvent (**beneficium divisionis**, introduced by Hadrian).

**218.** *A. and B., husband and wife, appear before a notary in Cape Town in 1900, in order to bind themselves as sureties for the debt of E. The notary draws up a bond which contains the following passage: "And the said B. expressly renouncing the benefit of the exceptions senatus consulti Velleiani et authenticæ si qua mulier . . . and both the said appearers A. and B. expressly renouncing the beneficia ordinis seu excussionis et divisionis . . ." Explain the force of these renunciations.*

The **Sc. Velleianum** (about A.D. 46) forbade women to become sureties for any person, and declared such contracts void. The usual way of claiming the benefit of the statute was by raising it as a defence (*exceptio*) in an action by the

creditor. A few exceptions from the operation of the statute came to be recognised, but Justinian enacted that no *intercessio* by a woman should be valid unless expressed in a document attested by three witnesses. By Nov. 134, 8, it was provided that no *intercessio* by a wife on behalf of a husband should be valid even though this form had been observed. This is what is referred to in the words "*authentice si qua mulier*" above, the notes of alterations made by the Novels and introduced by the glossators into their versions of the Code being termed *Authenticæ*.

The **beneficium ordinis seu excussionis** was the privilege, given to sureties by Justinian, of compelling the creditor to proceed against the principal debtor before suing them.

The **beneficium divisionis** was introduced by Hadrian in favour of sureties enabling them to compel the creditor to divide his claim rateably among the solvent co-sureties.

The renunciations referred to would disable A. and B. from taking advantage of these provisions.

**219.** *A. owes a debt to B. C. and D. become surety for the payment of the debt. How can this be done? C. eventually pays the whole debt to B. Can he recover any part of what he has paid from D.?*

By *fideiussio*, or by an agreement to pay the debt (*pactum de constituto*), or by a mandate given by C. and D. to B. to lend the money to A. (*mandatum qualificatum*). If C. paid the debt without arranging with the creditor to hand over the rights of action against D. (*beneficium cedendarum actionum*), he could not recover anything from D. The law did not assist him unless he availed himself of the *beneficium cedendarum actionum*, or of the *beneficium divisionis* of Hadrian by which he could insist upon the creditor dividing his claim among the solvent sureties.

**220.** *A. and B. become Fideiussores for the payment of a debt due by C. If C. fails to pay the debt what is the legal position of A. and B.?*

Originally A. and B. were severally liable for the whole debt, and payment by one of the whole amount did not give him a right of contribution against the other. But if the creditor proceeded against A. he could demand from the creditor a surrender of all his rights of action against the co-surety (**beneficium cedendarum actionum**). Hadrian introduced the **beneficium divisionis**, under which the creditor might be called upon to divide his claim amongst all the solvent sureties, and each surety was then liable to pay his share only; but in order to reap this benefit he must have claimed it when he was sued, otherwise he lost the right of contribution. Justinian introduced the **beneficium ordinis**, by which the creditor could be required to proceed against the principal first, after which he could sue the sureties for the balance unpaid.

#### 4. ELEMENTS COMMON TO CONTRACTS.

**221.** *To what extent did the Roman Law of Contract provide for Agency?*

**Agency.** The Roman Law recognised no real agency as we understand it, where the agent drops out and the principals only are bound. The nearest approach to agency was as follows: 1. Persons *in potestate* could acquire for father or master. 2. The prætor granted an action (*actio quod iussu*) where a person *in potestate* had contracted with a third person by the orders of the master or father. 3. The prætor made the master or father liable upon an implied contract where a contract entered into by a son or slave was for the benefit of the estate of the master or father (*actio in rem verso*). 4. The contracts made by the captain of a ship (*exercitor*) or the manager of a shop

(*institor*) bound the owner ; but both captain and manager were also personally liable. 5. In later Roman Law, by an extension of the *actio institoria* (*actio quasi-institoria*), the liability of a principal on a contract made by an agent within the scope of his authority was made general, but the agent remained personally liable.

**222.** *To what extent could an agent bind a principal by a contract of sale? Was there any difference according as the agent was or was not a slave of the principal?*

Generally, an agent could not bind a principal in contract. In the case of a freeman out of the family, he could be an agent to bind the principal in two cases only: (a) if he were a master of a ship, in which case he bound the owner: (b) if he were the manager of a shop or business or the like. In later Roman Law the principal could be made liable on a contract made by any duly authorised agent by the *actio quasi-institoria*. A slave could not, as a general rule, bind the master as principal in a contract of sale because the contract created liabilities as well as rights. To this there were three exceptions: (a) when the contract was entered into by the slave on the express order of the master or when the master ratified a contract made by the slave; the *actio quod inssu* then lay against the master; (b) when the slave had contracted so as to benefit the master's property, the *actio de in rem verso* lay; (c) when the slave was master of a ship or manager of shop or business.

**223.** *What was the effect of a contract entered into by a woman, slave, pupillus, minor, agent?*

**224.** *What remedies could a creditor employ in respect of debts incurred by a slave? To what extent could the creditors of a slave have a remedy against the Peculium?*

*Woman.*—During the time when women were under perpetual tutelage, they required the *auctoritas* of the tutor

to bind themselves in any transaction governed by the strict *ius civile*. They could, however, bind themselves without the tutor's intervention in transactions *iure gentium* and they were capable of alienating *res nec mancipi* without such authority. When the perpetual tutelage of women was abolished they became capable of incurring obligations. But the *Sc. Velleianum* (A.D. 46) forbade women to bind themselves for the liabilities of another person.

*Slave*.—A slave could not contract for himself. An agreement entered into by or with him, on his own behalf, gave rise to a *naturalis obligatio* only; he could not sue or be sued on it. As to his *peculium*, a slave could bind himself whenever a freeman could do so. The master was then liable to the extent of the slave's *peculium* in an *actio de peculio*, after deducting all claims he might have against the slave. If the slave were trading with his master's consent the master was ranked as an ordinary creditor. Slaves might, however, contract as agents for their masters. See 221 and 222.

*Pupil*.—He could make his position better, but not worse, without the *auctoritas* of the tutor. He could acquire rights but could not incur liabilities without this authority. Hence, if money was lent to him without the tutor's *auctoritas* under a *mutuum*, the money so lent could not be recovered from the pupil. Payment of a debt to the pupil did not extinguish it, and the tutor might sue for the debt, but the debtor might set up a plea of fraud; and so far as the pupil still had the money in his possession the debt was cancelled, otherwise the debtor had to pay again. So in such contracts as sale and hire, the other party was bound, but not so the pupil, but the prætor in the exercise of his equitable jurisdiction would not allow a pupil to keep the benefit of a bargain without paying for it.

*Minors*.—See 225.

*Agent*.—In every case the agent himself would be liable personally, and the principal would only be responsible in certain cases, for which see 221 and 222.

**225.** *Under what disabilities did persons under twenty-five years of age suffer as regards the making of contracts?*

**Contracts of adolescents.**—If the minor had a curator, his consent was necessary, and, when given, the contract was valid. When the minor had no curator he might make a contract which would be binding on both parties, but if the minor could show that the contract was a foolish one the prætor would protect him by annulling the contract and restoring him to his former position (*restitutio in integrum*).

**226.** *What was Diligentia? What degrees of diligence were recognised? Give examples.*

**227.** *What were the different standards of Culpa, and upon what general principles was the responsibility for Culpa imposed upon a party to a contract?*

**Diligentia** was the care which a contracting party was required to show in the treatment of the matter or property entrusted to him. It was of two kinds :—(1) *Exacta diligentia* or the care of a *bonus paterfamilias*, being the care of a prudent man of business; (2) *Ordinary diligence*, or the care which a man of average discretion usually bestowed on his own affairs.

The different standards of *culpa* may be reduced to three : (1) *Culpa lata*, egregious fault, amounting almost to *dolus*, i.e., the fault that no one of intelligence would have committed; (2) *Culpa levis in abstracto*, the fault that a *bonus paterfamilias* would not commit, i.e., failure to use *exacta diligentia*; (3) *Culpa levis in concreto*, when the person negligent did not take the care that an average man ought to show in his own affairs, i.e., failure to use ordinary diligence.

**Rules of diligence.**—A person was liable for *culpa levis in abstracto*, i.e., had to show *exacta diligentia*: (a) when the contract was exclusively for his benefit, e.g., the *commodatarius*; (b) when the contract was for the mutual benefit of both parties, e.g., pledgee, vendor and vendee, letter and hirer; [the obligation in the case of partners

being only to use ordinary diligence (*quanta in suis rebus*) was an exception to this]; (c) when he voluntarily undertook a trust, e.g., the *mandatarius* and the *negotiorum gestor*.

A person was liable for *culpa levis in concreto*, i.e., had to show ordinary diligence: (a) where the contract was solely for the benefit of the other contracting party, e.g., the *depositarius*; (b) where both parties had a common interest, e.g., partners; (c) where the duties were imposed by law, e.g., the *tutor* or *curator*.

**228.** Explain the effect of Mistake on contracts in Roman Law, distinguishing between cases of mistake of law and mistake of fact.

**229.** In what cases could a contract be set aside on the ground of error?

"Essential error alone is a ground of nullity" in the case of contracts; and by essential error is meant (1) mistake in the nature of the legal right or relation to be produced; (2) in relation to the person to whom the promise is made; (3) in relation to the subject matter of the contract (**error in corpore**); (4) in relation to the quality of the subject matter, in which case the error will be essential if its effect is to place the subject matter in a different class of merchandise. Non-essential error does not affect the contract, and a mistake in motive or purpose is such. As to mistake of law, see **242**.

**230.** Consider the following case, and give reasons for your conclusion. Titius sells Mævius a bronze vase which Mævius (unknown to T.) mistakenly believes to be gold. Is the sale good?

According to Savigny, the sale would not be good, because, although the error is one *in materia*, yet it is such as to put the subject matter in a different class of merchandise.

**231.** *What is the position of a person to whom a pupillus, without the authority of his tutor, has (a) sold a horse; (b) lent money; (c) given a receipt for a debt; (d) paid a debt?*

The general principal was that the pupil could make his condition better but not worse, without the authority of the tutor. (a) The pupil could not make the purchaser the owner of the horse, and could claim it back; the prætor would, however, not let him do this without returning the money; (b) the money could be recovered; if the contracting party had been guilty of *mala fides* he might be compelled to pay damages by way of compensation; (c) the debt was not extinguished, but the pupil kept the money; the debtor, if sued, could plead *dolus malus*, and might be credited with so much of the money paid as the pupil actually had in his possession, but no more; (d) the money could be recovered, but the prætor protected a *bona fide* creditor by allowing him to set-off his debt against the claim.

**232.** *Define Vis, Metus, Dolus, and explain their effect on the validity of a contract.*

**Vis**, or violence, was the actual exercise of superior force in order to compel a party to enter into a contract. **Metus**, or intimidation, was a threat of immediate evil which forces a party to contract. If either of these amounted to an illegal act it made the contract void, otherwise the contract was voidable only. It did not matter from whom the violence or intimidation came. **Dolus**, fraud or deceit, was any deception which made it inequitable to enforce the contract. To make the contract voidable, it must be imputable to the other party to the contract, and not to a stranger. *Dolus* might consist of a *suggestio falsi* or a *suppressio veri*.

233. *Examine the nature of the distinction to be drawn between Correality and Solidarity in contracts.*

According to some writers (e.g., Poste and Moyle) a distinction is to be taken in joint obligation between **correality** and **solidarity**. The term "correality" is applied when there is one principal obligation and the other joint obligations are dependent on or accessory to it, as in the case of *Fideiussio*; there is no right of contribution between the parties; and all the obligations are extinguished by *litis contestatio* in an action against one of the joint obligors. "Solidarity," on the other hand, applies when there are distinct obligations, but all with reference to the same subject-matter; the parties are liable to contribute; and the obligations are only discharged by performance. The distinction was not taken by the Roman lawyers and does not appear to be tenable. Even in the case of *fideiussio* the obligations were distinct, as they could be made at different times, and one surety could be bound conditionally and another unconditionally. Further, the extinction of the obligations by *litis contestatio* was an incident, not of joint obligation, but of one form in which it was contracted, viz., the *stipulatio*.

234. *Classify the modes in which Intercessio could take place, and cite the most important laws dealing with the subject.*

**Intercessio** was a general term used in Roman Law to indicate the substitution or addition of a new debtor. It was either (1) Privative or (2) Cumulative.

(1) Privative *Intercessio* was the substitution of one obligation for another, e.g., by *Expromissio*, the substitution of one person as debtor in place of another who was discharged.

(2) Cumulative *Intercessio* was the addition of an obligation

to an existing obligation, *e.g.*, the various forms of suretyship.

The most important laws dealing with the subject were the *Lex Furia de Sponsu*, the *Lex Apuleia*, the *Lex Cornelia*, the *Lex Publilia*, and the *Sc. Velleianum*. See Appendix.

**235.** *To what extent, and by what methods, could the benefit of an obligation be transferred?*

**Transfer of obligations.**—(a) Roman Law did not at first recognize the transfer of obligations apart from an absolute *novatio*; which was not in fact a transfer, but the substitution of a new agreement. (b) The nearest approach to a transfer took place when the assignee was allowed to sue as proxy (*procurator in rem suam*). The action was brought in the name of the principal, but the judgment was for the procurator. The *formula* and *condemnatio* would run: "If the debtor owes Titius the sum of ten aurei let him be condemned to pay Gaius (the procurator)." Until the *litis contestatio* (the close of the pleadings) the *procurator* had no personal right and his agency might be revoked. (c) Subsequently, the mandate of the *procurator* was made irrevocable as soon as he had given notice to the debtor. By such notice he had a right to stand in the position of creditor and to be paid. There was not, however, an assignment of the claim—the procurator was not in fact the creditor, but he had a right to payment as if he were. (d) Finally, by legislation between the time of Antoninus Pius and that of Diocletian, legal effect was given to any assignment, whether by sale, *donatio*, or other method, where there was an intention to transfer the obligation. The assignee became the creditor, subject to all equities; the debtor was bound to pay him alone after notice of the assignment, and the assignee had a *utilis actio* in his own name. The *lex Anastasiana* restrained an assignee from recovering from the debtor more than he had paid for the assignment of the debt.

**236.** *Specify the different ways in which an obligation could be altered, transferred or dissolved.*

**Extinction, etc., of obligations.**—(1) By payment or performance (*solutio*), either of the thing due, or, with the consent of the creditor, of anything in the place of what was due. (2) By **release**. A contract could be released in the same way that it was created. Aquilius Gallus, the colleague of Cicero, invented a form by which any and all contracts and other obligations might be converted into a verbal contract, and then that contract dissolved by *acceptilatio*, which was the form of words used to extinguish a verbal contract (see **238, 239**). (3) By **novatio**. This was the dissolution of one obligation by the making of another. This was done in three ways: (a) by the same parties making a new contract containing the same terms, either by a *stipulatio* or a contract *litteris*; (b) by substituting a new creditor; (c) by substituting a new debtor. Justinian required that whenever novation was intended, the contracting parties must expressly state that the new contract was to extinguish the former one. Prior to Justinian, *litis contestatio* (close of the pleadings) in an action on the contract operated as a *novatio* in some cases. (4) By *merger*. When the same person acquired the rights of both creditor and debtor.

**237.** *What was meant by the extinction of contract ope exceptionis?*

To an action on a contract the defendant might plead certain defences (*exceptiones*) which, if established, would in effect release him from his obligations under the contract. Thus, he might plead to an action on a stipulation that the money consideration had never been handed over (*exceptio pecuniæ non numeratæ*); again he might plead an agreement that the debt was not to be demanded of him (*exceptio pacti conventi*); or that the circumstances were such as to make it inequitable that the plaintiff should

succeed (*exceptio doli mali*) ; or that the matter in dispute is *res judicata*. In all these cases the contract is not denied, but as it cannot be enforced it is to all intents and purposes extinguished.

**238.** "A stipulation has been invented, commonly called *Aquilian*, by which an obligation of any kind whatever can be clothed in **stipulation form**, and then extinguished by **acceptilation** ; for by this process any kind of obligation can be **novated**" (*Inst. iii. 29, 2*). Explain the phrases in *clarendon type*. Reproduce the form of this stipulation as nearly as you can.

**239.** State the substance, and explain operation of the *Stipulatio Aquiliana*.

The **Aquilian stipulation** was a method of formally releasing any obligations, however incurred, whereby the obligations were converted into one stipulation, and then that stipulation was formally discharged by **acceptilatio**. It, therefore, consisted of two parts, the stipulation and acceptilation. First, the creditor stipulated with the debtor to the following effect : " Whatever you are, or shall be, or may be bound from any cause to do, or give, for, or to me, whether now or at some future day ; and for whatever I may have an *actio*, or *petitio*, or *persecutio*, against you ; and whatever you have, hold, or possess belonging to me ; or whatever of mine you have parted with through your own fraud or fault ; whatever may be the value of all these things, do you, the debtor, promise to give to me ? " The debtor replied in the affirmative. This constituted the stipulation in which all the other obligations merged by **novatio**. Secondly, the debtor in his turn queried : " All that I have to-day promised you by the *Aquilian stipulation*, do you, the creditor, acknowledge it as received ? " The creditor replied, " I have entered it in my book to your credit (*acceptum tui*). " By this second step, called the

**acceptilatio**, constituting a formal release, the stipulation was extinguished, and with it all those obligations included in it.

## 5. QUASI-CONTRACTS.

**240.** *What were the obligations Quasi ex Contractu? Enumerate those mentioned in the Institutes and state why they are so called.*

**Obligations quasi ex contractu** were obligations analogous to those arising from contract, but imposed by law on equitable grounds and not founded on any agreement of the parties. They were: (a) **Negotiorum gestio**, where a person (*negotiorum gestor*), without receiving a mandate to do so, took upon himself to manage the affairs of another during that other's absence. His duties were: (1) to show *exacta diligentia* and (2) to account for his management. He was entitled to be recouped expenses. (b) **Condictio indebiti**. If money were paid under a mistake of fact the law implied a promise on the part of the recipient to pay it back. Not so if the money were paid under a mistake of law or under a *naturalis obligatio*. (c) Such obligations arose also between tutors and pupils, curators and wards, owners in common, co-heirs, and heirs and legatees. The word "**quasi**" = "analogous to," and these obligations were so called because they were similar to the obligations arising from contract.

**241.** *Under what conditions could a condictio indebiti be brought? From what class of cases was it specifically excluded?*

The conditions under which a **condictio indebiti** would lie were:

- I. What was paid must not have been owing even under a natural obligation.
- II. The payment must have been made by mistake.

III. The payment must have been accepted in good faith; if the payee knew that the debt was not owing, and received the money, he was guilty of theft, and would be liable to a *condictio furtiva* which excluded the *condictio indebiti*.

The *condictio indebiti* was excluded in all cases in which payment was made by a defendant in an action to avoid an increased liability contingent on his persisting in disputing the claim [*ex quibus causis infitiando lis crescit*—J. III. 27. 7].

**242.** *Under what circumstances could money paid by mistake be recovered?*

Money paid under a mistake could be recovered by the *condictio indebiti*, subject to the following conditions:

- I. The payment must not have been made in pursuance of an obligation either civil or natural.
- II. The mistake must have been one of fact and not of law, for every one was conclusively presumed to know the law.

Certain classes of persons, however, *e.g.*, minors, women, soldiers, and rustics, could claim relief even if the mistake was of law.

- III. The payment must not have been made by way of admission of liability in a suit in which *lis crescit infitiando*, *i.e.*, where increased damages were payable in case of an unsuccessful defence.

The payment in this case, even though made under a mistake, was regarded as a compromise, and as being in effect made in pursuance of a contract.

**243.** *Compare Mandatum with Negotiorum Gestio.*

(1) **Mandate** was based upon the request of the *mandator*, whereas the *gestor* acted without the instructions, and without the knowledge, of the person whose business he superintended. (2) **Mandate** might be for the benefit of

others than the *mandator*, but the *gestio* was solely for the benefit of the absent person. (3) *Mandate* was one of the recognised contracts, and the obligation arose from the agreement of the parties. The obligation in **negotiorum gestio** was imposed by law on considerations of equity. It was **quasi ex contractu**.

## 6. DELICTS AND QUASI-DELICTS.

**244.** *Define Delictum. What classification of Delicts is given in the Institutes? Show in the case of each of the obligations Quasi ex Delicto why they should not be classed as arising from true Delicts.*

**Delictum.**—An actionable wrong done to one's property or person. Wrongs to property were **Furtum**, **Vi bona rapta** and **Damnum iniuria**. A wrong to the person was **Iniuria**.

**Quasi-delicts.**—These were certain wrongs which were actionable, but which did not fall within the category of *Delicts*, because they did not come within the provisions of some statutory enactment, or they were cases of vicarious responsibility, and not directly imputable to the fault of the person held liable. The examples given are: 1. Where a judge makes a cause his own, *i.e.*, gives a wrong sentence through corruption, or favour, or ignorance. There being no injury done to a body (*corpori*) such a wrong did not fall under the *lex Aquilia*. 2. An occupier of a house was liable where injury had been done through anything thrown down from the house. If a *filiusfamilias* were alone the occupier, he, and not his father, would be liable. Here the person liable did not himself do the damage, so he could not be liable under the *lex Aquilia*. The prætor made him responsible, for the protection of the public. 3. The master of a ship, or an inn, or a stable, was liable for loss arising from *dolus* or theft on the part of his servants. Here also was no liability on the part of the

master under the *lex Aquilia* : though the servants might be so liable for damage, or in an *actio furti*." 4. Where anything was allowed to hang in a public place so as to be a danger to passers-by. Here no actual damage need be done, but the prætor made this penal in order that the public might be protected.

**245.** Define *Furtum*, and distinguish *Furtum Manifestum* and *Nec Manifestum*, *Conceptum*, and *Oblatum*. Could a man under any circumstances be condemned for stealing his own property?

**Furtum** is the fraudulent dealing with property of another, or with its use or possession. It was of four kinds: (a) **Manifestum**, when the thief was caught red-handed, or on the premises where the theft had taken place, or where he had the stolen property on him, but before he had reached the place where he was going to deposit it. (b) **Nec manifestum**, in other cases than those above stated. (c) **Conceptum**, where stolen property was found on the premises of another after search. (Obsolete in Justinian's time.) (d) **Oblatum**, where stolen property was brought into the house of another in order that it should be found there rather than in the house of the person depositing it.

A man might sometimes be condemned for stealing his own property, as where a debtor takes fraudulently from his creditor property which he has deposited with him by way of pledge.

**246.** Define *Furtum Manifestum* and *Furtum Nec Manifestum*. Explain how a receiver of stolen goods was dealt with in early and in late Roman Law respectively. How do you account for the penalty for *furtum manifestum* being double that of *furtum nec manifestum*.

For definitions, see **245**.

In early law, the receiver was liable to an action *furti concepti* for a penalty of three times the value of the goods

stolen. Under the XII. Tables, if stolen goods were found after a formal search (*lance licioque*—"with the dish and linen girdle"), the person in whose possession they were found was liable to the penalties of *furtum manifestum*, i.e., four times the value of the thing stolen. If a person resisted a search for stolen goods, he was liable to the prætorian action *furti prohibiti* for a fourfold penalty. This action superseded the *actio furti lance licioque concepti*. There was also a prætorian action *furti non exhibiti* against a person who refused, on demand made, to produce stolen goods. In later law receiving stolen goods was treated as *furtum nec manifestum*. The distinction between the penalties in *furtum manifestum* and *furtum nec manifestum* was probably a survival of archaic ideas. An increased penalty was allowed against the thief taken in the act to induce the injured person to forego his vengeance, and to submit to judicial arbitration. Early law took into account the measure of vengeance likely to be exacted by an aggrieved person under the circumstances of the case. The injured party was likely to visit on the thief more severe retribution when the latter was caught in the act, than, after an interval, when his anger had had time to cool. The severer penalty was probably retained in later law on more reasonable grounds; on the ground, for instance, that the manifest thief was usually more dangerous than the non-manifest thief.

**247.** *What actions arose upon Furtum? State with respect to each action the parties by and against whom it could be brought, and the measure of amount claimed.*

**248.** *In what cases could the Actio Furti be brought by a person who was not the actual owner of the thing? Mention any cases in which the actual owner could not bring the action.*

*Actio manifesti*: penalty, four times the value of the thing. *Actio nec manifesti*: penalty, double value. *Actio*

*concepti* : penalty, three times the value against the owner of the house in which the property is found. *Actio oblati* : penalty, three times the value, against the person who deposited the stolen property.

**Who had *actio furti* ?**—Anyone could bring the action of theft who was responsible for the safety of the thing, whether he were the owner or not. The owner could not sue when he had no interest in its safety, *i.e.*, when he would be indemnified against its loss; except in the case of *commodatum*. Pledgees and hirers had the action; deposites had not. The rules in *commodatum* were special. Justinian enacted that the owner might elect between an *actio commodati* against the borrower, and an *actio furti* against the thief. If he had commenced an action against the borrower, and then learnt for the first time of the theft, he might drop that action and proceed against the thief. If the owner elected to sue the borrower, the borrower might bring the *actio furti* against the thief.

**249. Define *Furtum*.** *In what cases could a thief be sued by a person who was not the owner, and in what cases was the owner unable to sue the thief?*

**Furtum** is the fraudulent dealing with either a thing itself, or with its use, or with its possession. The following persons, not being owners, could bring the action : (1) the *usufructuarius* ; (2) the *usuarius* ; (3) the creditor of a thing pledged ; (4) the *bonâ fide* possessor ; (5) the *conductor operis*, if solvent ; (6) the *commodatarius*, if sued by the lender, who knew that the thing had been stolen, and who elected to sue the *commodatarius* rather than the thief.

The owner could not bring the action : (1) in the case of a *locatio-conductio operis*, where the *conductor* was solvent, because he had an action against the conductor ; (2) in the

case of *commodatum*, where he had elected to sue the *commodatarius*.

**250.** *Titius urges the slave of Mævius to steal from his master certain things and to bring them to him (Titius). The slave informs his master, who, wishing to seize Titius in the act, permits his slave to take certain things to Titius. Can Mævius bring any, and what, form of action against Titius?*

Justinian decided that Mævius might proceed against Titius in an *actio furti* for theft and in an *actio servi corrupti*, as if the slave had been actually corrupted. Prior to Justinian the matter was in doubt, because the taking was not fraudulent, and the slave was not corrupted (J. 4, 1, 8).

**251.** *Name any respects in which Furtum in Roman Law differs from Larceny in English Law.*

**Furtum**, although in later Roman Law criminally punishable, is treated in the Institutes as a civil wrong, involving penal consequences. Larceny, in English Law, is the term applied to the crime of stealing property in the possession of another person; and, under that denomination, is exclusively dealt with as a crime, although a civil action may also be brought for the wrongful conversion of the property in question. *Furtum* included any fraudulent dealing with the movable property of another or with the use or possession thereof and was much wider in its application than larceny. It covered many acts which would not come under the English common law definition of larceny, as, for instance, larceny by bailees, and other cases of statutory larceny. Larceny, in the strict sense, is confined to cases in which a thing is taken out of the possession of the owner, without his consent, with a fraudulent intention of depriving him of his property therein. There must be a "taking and carrying away," which was not necessary in the case of *furtum*.

**252.** *In what respects is the offence which the Romans called *Vi bona rapta* treated differently from ordinary *Furtum*, and on what grounds?*

The penalty in **Vi bona rapta** was practically only three-fold as the quadruple value recoverable included the value of the property taken. After the lapse of a year (*annus utilis*) only the value of the property could be recovered. In the case of *furtum*, in addition to the quadruple or double penalty, the property or its value could be recovered by an independent action; so that the *actio furti* was purely penal. The injured person in the case of manifest theft, would naturally prefer the *actio furti*; but, within the year, in the case of robbery amounting to non-manifest theft, the injured person could claim a more severe penalty than that afforded by the *actio furti*. If he did not take proceedings until after the expiration of the year, he would resort to the *actio furti*. The *actio vi bonorum raptorum* was open to persons who could not bring the *actio furti*, e.g., the depository (see J. IV. 2. 2). The reason for this was that the object of the prætor, in introducing the action, was to punish open breaches of the peace quite as much as to protect property.

**253.** *By what authority were the actions *Vi Bonorum Raptorum*, and *Iniuriarum* established? Under what conditions could they be brought? Give examples.*

**Vi bonorum raptorum.**—This action was introduced by the prætor and was available when theft had been perpetrated by force. The penalty was *four* times the value, if the action were brought within a year; and the mere value, if brought later. Being penal the action could not be brought against the heirs of the thief. The penalty, unlike that of the *actio furti*, included the value of the thing stolen. The action was available to anyone who had a legal interest in the thing not being taken away by force. It was always available to the person who had the *actio furti*, but it was

also available to some persons who had not the action of theft, *e.g.*, the depositary. *Actio Iniuriarum*: see 257 and 258.

**254.** *What was necessary to constitute the Obligatio Vi Bonorum Raptorum? A., seeing a sheep in B.'s flock which he believes to be his, takes it by force; has he incurred any legal liability?*

There must be a fraudulent taking with violence. A. is not guilty of the offence *vi bonorum raptorum*, but under a constitution of Valentinian and Theodosius he would be punished by being deprived of the sheep, if it proved to be really his property; and if it should not be his, by restoring it and paying its value. (J. IV. 2. 1.)

**255.** *State shortly the provisions of the lex Aquilia, and show how the letter of its provisions was expanded under the hands of the jurists.*

The **lex Aquilia** enacted: (1.) That a person wrongfully (*i.e.*, intentionally, negligently, or unskilfully) killing the slave or four-footed beast (being cattle) of another should pay the highest value of the thing during the year previous. (2.) That a person wrongfully doing any damage to another's property of whatever kind should pay the highest value of the thing during the thirty days previous. [Another section gave an action against an *adstipulator* for the damage sustained by his fraudulently releasing the debtor by *acceptilatio*.]

**Expansion by Interpretation.**—The *lex* gave an action only when the damage was done by the body to the body (*corpore corpori*): this was an *actio directa*; *e.g.*, A. stabs B.'s slave. The prætors extended the remedy: (a) To cases in which the damage was done *non corpore sed corpori*: this was an *actio utilis*; *e.g.*, A. locks B.'s slave in a room and starves him. (b) To cases in which the damage was done

*nec corpore nec corpori*; this was an *actio in factum*; e.g., A. strikes off the chains of B.'s slave and he escapes.

**256.** Give an account of the *lex Aquilia* concerning *damnum iniuria datum*. Could an action be brought under it by a *paterfamilias* if (a) his eye was struck out by negligence, (b) his son was killed by negligence.

For the *lex Aquilia* see **255**.

(a) A *utilis actio* under the *lex Aquilia* could be brought. There was not a direct action because "no one appears to be proprietor of the parts of his own body." (D. 9. 2. 13. pr.).

(b) The *paterfamilias* could bring a *utilis actio* under the *lex Aquilia*. (Ib. 5.3; 6; 7 pr.)

**257.** Define the nature of *Iniuria*, showing in what respects it differs from other delicts. What was the history of the penalties incurred by its commission?

**Iniuria** was the wilful infringement of the rights to personal freedom, safety, or reputation. It differs from the other delicts treated of in the Institutes, in that they are offences against property. It differs from *damnum iniuria* in that direct intention is essential.

By the XII. Tables the penalty for a limb destroyed was retaliation, unless the parties could agree on compensation; for bones broken, 300 *asses* in the case of a freeman, and 150 *asses* in the case of a slave; in other injuries, a fine of 25 *asses*. In lieu of these penalties the prætor introduced a measure of damages varying with the nature and circumstances of the injury and the rank of the injured party. The plaintiff was allowed to estimate his damages in his claim, and the judge might modify the amount in his award if he considered it unreasonable. In the case of *atrox iniuria* the prætor fixed the damages in the *formula*.

**258.** *What wrongs were included under the name Iniuria? Could an Actio Iniuriarum be brought when harm was done by negligence? When was Iniuria said to be Atrox?*

**Iniuria** consisted of any intentional wrongful act affecting the person or reputation of a freeman and committed by a person himself, or by another at his malicious instigation: e.g., personal injury, libel or affront however offered, whether directly to one's self, or indirectly through a member of one's family. Example: If A. strike B.'s daughter-in-law; the daughter-in-law, her husband, her father, and B. have a right of action for the *iniuria* done them through the assault.

The action was given by the XII. Tables, but the penalties fixed by that statute received considerable modification at the hands of the Prætor. It could not be brought after one year, and was not transmissible to the heirs unless it had reached the stage of *litis contestatio*. The penalty was in the discretion of the judge. The action could not be brought when the harm resulted from negligence. The wrongful act must be intentional. Iniuria might also be punished criminally (J. IV. 4. 10). **Iniuria atrox** was so called when the act was specially outrageous on account of the: (a) nature of the act, e.g. wounding; (b) the public nature of the place where the insult was offered, e.g. in a theatre; (c) the part of the body injured, e.g. an eye; (d) rank or position of the person injured, e.g. a magistrate, ascendant, or patron.

**259.** *Owing to an act on the part of A., B.'s arm is broken. To what different kinds of action might the occurrence give rise, and against whom and at whose suit (1) if A. were a slave, (2) if B. were a slave, (3) if both were cives and sui iuris? Would it make any difference whether the act was done intentionally or negligently?*

(1) Noxal action under the *lex Aquilia* against A.'s master. If done intentionally with the object of insulting B., the *actio iniuriarum* would lie.

(2) Action under third section of *lex Aquilia*. If done intentionally, to insult B.'s master, an *actio iniuriarum* would lie against A.

(3) If the injury were the result of negligence an *actio utilis* under the *lex Aquilia* could be brought; if the act were intentional, an *actio iniuriarum* would lie against A.

**260.** *In what cases could one person be sued for the wrongs done by another?*

(1) The proprietor, or hirer, or other occupier, of a house was liable for any injury caused by anything being thrown down or poured out therefrom (*actio de effusis vel deiectis*).

(2) The master of an inn, or a ship, or a stable was liable for loss sustained by the theft or fraud of his servants.

(3) A master could be made liable for the delicts of his slave, in a noxal action, but he had the option of surrendering the slave by way of satisfaction.

**261.** *What remedy existed in the Roman Law in the case of injuries caused intentionally and by negligence?*

Injuries caused intentionally were punished by an *actio iniuriarum* if the wrongful act affected the person or reputation of a freeman; and by an *actio furti*, or *vi bonorum raptorum*, if the act amounted to theft or robbery; and by an action under the *lex Aquilia* if the act caused damage to property.

For injury caused to property by negligence an action would lie under the *lex Aquilia*.

**262.** *What, in Roman Law, was the nature and extent of the liability of a person from whose leasehold house something was thrown by a guest to the injury of a passer-by? What if the householder was a son-in-power living apart from his father?*

The occupier of the house was liable for double the damage caused. If a freeman was killed, there was a

penalty of fifty *aurei*. If a freeman was injured the householder was liable to pay such compensation as the judge should deem equitable, having regard to medical and other expenses incurred and loss sustained through inability to follow his employment. If the householder were a *filius-familias* living apart from his father, the action only lay against the son. The father was not responsible. If the householder were found liable in an action *de effusis vel deiectis*, he could recover from the actual wrong-doer (in this case, the guest) by an action *in factum*, unless the offender were his *filiusfamilias* or slave, in which case he could pay the damages out of the *peculium*.

**263.** *Describe the condition of a slave in the earlier and later Roman Law. Point out the difference between a master's liability for delicts committed by his slave, and the liability of an employer under English Law for injuries caused to strangers by the negligence of his servants.*

See **33**.

The master was liable for the delicts of his slave, but on being sued could, in satisfaction, abandon his slave by way of *noxæ* to the person injured. By this means his liability could be limited to the value of the slave, but this course was not open to the master when the wrongful act had been committed by his slave with his knowledge. The employer in English Law is liable for injuries caused to third parties by the negligence of his servant, provided that the act causing injury is done by the servant in the course of his employment and with the object of promoting the employer's interests.

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V.—LAW RELATING TO WILLS AND  
SUCCESSION.

SANDARS.—II., Titles 10—25 ;

III., Titles 1—6 and 9—12.

MOYLE.—Notes to II. 10.14 ; 11 ; 14. pr. and 5 ;

18. pr., 3 and 7 ; 22 ; 23. 1—7 ; 25 ;

Excursus IV.

MUIRHEAD.—Sections 32, 54 and 70.

POSTE.—Notes to II. 238, 242, 246 ;

III. 77.

SOHM.—Book III., Ch. II.

MAINE.—Ch. VI. and VII.

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**264.** “ *The object of a will was to transfer a universal succession.* ” Explain this statement and show how the object was attained.

**265** What was the original object in Roman Law of testamentary succession ?

By the appointment of an heir, which could only be effected by a valid will, the *persona* of the deceased was perpetuated in the person named as his successor. The heir stood in the shoes of the deceased. He took upon himself all the rights and duties of the deceased ; in other words, he succeeded to a *universitas iuris*. In English Law the executor is appointed simply to distribute the estate. The object of a will in early Roman Law was not to distribute the estate, but to appoint some one to carry on

the legal personality of the deceased testator, to perform the necessary obsequies, and maintain the family *sacra*.

Hence, as representing the family, the *heres* succeeded to all the rights and duties of the deceased and assumed, as it were, his legal person.

Until the legislation of Justinian, the appointment of a *heres* was essential to the validity of a will. It was only in later times that the will came to be regarded as an instrument for distributing the testator's property. Justinian recognised the change of view and by his legislation practically converted the *heres* into an executor in the modern sense.

**266.** "*Inheritance is a universal succession occurring at death.*" Explain this statement, describing the nature of an inheritance (*Hereditas*) and a universal succession (*Successio in Universum Ius*).

The **hereditas** was the legal representation of a deceased person and involved succession to the whole of his rights and liabilities, to his **universitas iuris**. A universal succession was a succession to a *universitas iuris*, i.e., to the universality of a man's rights and duties. The successor stepped into the legal position of the person he succeeded and continued his *persona*. *Hereditas* was one form of universal succession; it was a succession to a person's *universum ius* occurring on his death.

**267.** *What is meant by Universal Succession? What modes of universal succession are mentioned by Justinian?*

A **universal succession** is a succession to a *universitas iuris*, i.e., to all the rights and all the duties and liabilities of another person. The modes of universal succession mentioned by Justinian are (1) *Hereditas*, (2) *Bonorum Possessio*, (3) *Adquisitio per arrogationem*, (4) *Addictio bonorum libertatis causa*, (5) *Bonorum emptio* (obsolete in

the time of Justinian), (6) *ex Senatus consulto Claudiano* (abolished by Justinian).

**268.** *State summarily the principal steps in the development of the law of Testation.*

The earliest form of Will was that made in the **c. curiata** and consisted in an oral declaration made by the testator to the assembled *gentes*. It was solemn in its forms and could only be made by Roman citizens, and probably was confined to patricians. It was an expedient for continuing the family of the testator, in default of *sui heredes*, by nominating an heir who should undertake the *sacra*. It is thus closely connected with the institution of Adoption.

In time of war the ceremonial of a declaration in the *comitia* was dispensed with: soldiers might make a will in **procinctu** (in fighting order). This was effected by any form of unequivocal declaration of intention.

**Testamentum per æs et liram.**—The plebeians probably could not make a will in the *comitia*, having no *locus standi* there, and the necessity of having some recognised mode of appointing a successor led them to fall back on the ceremonial conveyance by *mancipatio*.

But this means the testator conveyed his estate to a *familie emptor*, (who at first was actually the heir,) and declared his intentions in the presence of five witnesses and a *libripens*. This operated as an irrevocable conveyance and took effect at once, but in most cases subject to a *fiducia* or trust to allow the assignor to continue to enjoy a life interest in the estate.

The XII. Tables gave statutory sanction to this form of will and directed that the declaration of the testator's intentions should be observed (*cum nexum faciet mancipiumve uti lingua nuncupasset ita ius esto*). The *nuncupatio* then came to be regarded as the important element in the ceremony and the rest of the proceedings as formal. This

led to the introduction of some third person as *famulus emptor*, and the will acquired the elements of secrecy and revocability.

**Prætorian Will.**—The Prætor subsequently recognised the validity of a testament, although the forms of *mancipatio* had been omitted or imperfectly complied with, provided that it bore the seals of seven witnesses. He did this by giving **possessio bonorum secundum tabulas** to the appointed heirs; and a constitution of Marcus Aurelius enacted that the last wishes of the testator should not be disputed merely on the ground that they were not made with the forms of *mancipatio*.

**Testamentum tripertitum.**—Under the later Empire, the prevailing form of will was the *testamentum tripertitum*, arising, as its name implies, from three sources: (i.) the *ius civile* (necessity of witnesses and their presence together); (ii.) the Prætor's Edict (seals and number of witnesses); and (iii.) Imperial constitutions (signatures of testator and witnesses). This became the universal form of will in the Eastern Empire; in the Western, the testament *per æs et libram* was never quite superseded.

**Nuncupative Will.**—A nuncupative will in the presence of seven witnesses was recognised prior to Justinian and confirmed by him.

**269.** Explain the meaning of *Testamenti Factio*. At what point or points of time ought (a) a testator, (b) a witness, (c) an heir, (d) a legatee, to possess *testamenti factio*?

**270.** A. makes a will. Subsequently he incurs an incapacity which, had it existed at the date of the will, would have made it invalid. Is the will valid?

**Testamenti factio** is the capacity to make a will (*t. f. activa*); to witness a will (*t. f. relativa*); or to take under a will (*t. f. passiva*).

The *testator* was required to have the *capacity* (e.g., must be sane) to make a will only at the time of making it, but the *right* to make a will had to exist both at the time of making it and at the time of death. By the *ius civile* the right had to be available during the intermediate time, but prætorian law modified this.

The *witness* had to have capacity at the time of witnessing.

The *heir* and *legatee* must be capable at three periods:—

- (1) At the time of making, or the will was *nullius momenti* :
- (2) At the time of testator's death, when the rights of the heir commenced ; if a condition were imposed, the time for its performance was the period regarded and not the death :
- (3) At the time of entry on the inheritance (*aditio*) ; and therefore if the heir died before entry no rights passed to his heirs. Between (1) and (2) a change of *status* in the heir was immaterial if recovered in time ; but between (2) and (3) any disability destroyed the right to enter.

By the **regula Catoniana** a legacy void at the time of making the testament is void altogether.

**271.** *What persons were incapable (1) of making a will ; (2) of witnessing a will ; (3) of taking under a will ?*

*Making.*—All Roman citizens (*sui iuris*) could make wills with the following exceptions:—(1) *Filiusfamilias*, except of his *peculium* ; (2) *impubes* ; (3) *non compos mentis* ; (4) *prodigus* ; (5) deaf, dumb, and blind, except under special regulations ; (6) captives. A will made during captivity was invalid, but a will made before the testator was made captive revived on his returning to freedom by the **Ius Postliminii**. By this fiction all the period of captivity was disregarded by the law.

*Witnessing.*—Anyone having the *testamenti factio passiva* with the testator could also witness a will, except:—(1) The heir, or any one in the same family as the heir ; (2) woman ;

(3) *impubes* ; (4) insane, deaf, dumb ; (5) *intestabilis* ; (6) *filiusfamilias*, of his father's will ; (7) *paterfamilias*, of his son's will ; (8) slave.

*Taking under*.—The following could not take as heirs or legatees :—(1) *Peregrinus* ; (2) *Latinus* ; (3) *dedititius* ; (4) *deportatus* ; (5) uncertain persons, including municipalities and corporations ; (6) *proboscæ feminae* ; (7) women, under *lex Voconia*, in case of testators whose property was assessed at the census at 100,000 *asses* or upwards ; (8) unmarried or childless, under *lex Papia Poppæa*, with certain exceptions ; (9) apostates and heretics ; (10) children of traitors.

**272.** *How could a Roman make a will? Distinguish between Testamentum and Codicillus.*

There were seven ways existing at different times in Roman history in which a citizen could make a valid will.

- 1. Calatis comitiis** : that is, in the *comitia curiata* whilst sitting for the despatch of private business.
- 2. In procinctu** : a declaration made in the presence of the army drawn up in battle array.
- 3. Per æs et libram** : a fictitious sale by *mancipatio*, whereby the inheritance was sold to the heir to whom the vendor or testator gave directions. Subsequently a third person (**familiæ emptor**) was introduced as the vendee, and to him were the directions delivered, either orally or on tablets. The ceremony required the presence of : the testator ; the *familiæ emptor* ; the balance holder ; and five witnesses. Originally, the will was irrevocable, because it operated as a conveyance out and out.
- 4. The prætorian will**. Where a will was written, but was not executed with all the formalities of the civil law, the prætor gave *bonorum possessio* to the person named as heir, *provided the will was sealed by seven witnesses*. The prætor could not constitute such person heir, but he gave him possession, which ripened by lapse

of time into ownership. This will to a great extent superseded the mancipatory will, which, however, survived in the West until a comparatively late period. 5. **Tripertitum**: this was the Imperial will, which came into use in the later Empire. The requisites were: (a) That all seven witnesses should be present, and the will made *uno contextu*, i.e., at one and the same time, as required by the *ius civile*; (b) that the witnesses should affix their seals, as required by the prætor; (c) that the witnesses and the testator should sign the testament, as required by the Imperial constitutions. Justinian also required the name of the heir to be written either by the testator or by the witnesses; but this was subsequently dispensed with. This threefold origin of the requisites gave its name to the will (*Tripertitum*). 6. **Nuncupative**: a verbal or nuncupative will might be made in the time of Justinian, and even at an earlier period, by expressing testamentary intentions in the presence of seven witnesses. 7. Public wills (see 274).

**Difference between testamentum and codicillus.**—A *testamentum* was a formal expression of the intention of a testator by which an heir was appointed to succeed to the *universitas iuris*, and to distribute the estate in accordance with the directions given him. Only in this way could an heir be appointed, or an inheritance be given.

A *codicillus* was an informal expression of the intention of the maker, containing directions to anyone who should be his heir, as to the disposal of the whole or part of his property. No formalities were required as in a will, except that, later, five witnesses were necessary; neither a legal heir nor a legal tutor could be thus appointed; the legal inheritance could not be thus disposed of; there might be several codicils, but only one will; it could exist without a will, and then the heir *ab intestato* had to carry out the directions; and the *lex Falcidia* did not apply to a codicil.

**273.** *How was a will made in the time of Justinian? Explain how the difficulties attending the valid execution of a will might be removed by resorting to Fideicommissa.*

See **274.**

**Fideicommissa** were requests to the heir, or to anyone taking under a will, to execute the directions of the testator contained in the will, or they might be similar directions contained in codicils which the heir, under a will or on an intestacy, was bound to execute. In this latter way all the formalities in the execution of a will might be avoided, and the dispositions of the property did not depend upon any particular form of words as did legacies. By *Fideicommissa*, a person could benefit people incapable of receiving benefits under a will, e.g., a *peregrinus*, a *Latinus Iunianus* (but this power was considerably restricted by Hadrian's legislation); he could also avoid the restrictions of the *lex Falcidia* by the disposal of the whole, or more than three-fourths of his estate; but the *Sc. Pegasianum* enabled the heir to retain one-fourth where an estate was swallowed up by *fideicommissa*. (See **319.**)

**274.** (a) *In what ways could a will be made in the time of Justinian?*

(b) *What were the formalities proper to be observed on the opening of a will?*

(a) In the **time of Justinian** there were four modes of making a will, viz.:

(1) **Testamentum tripertitum**, in writing, in the presence of seven witnesses, signed and sealed by the witnesses, and signed by the testator, or written throughout in his own hand (*testamentum holographum*).

(2) **Private nuncupative will**, an oral announcement of the testator's testamentary dispositions, made in the presence of seven witnesses.

(3) **Public nuncupative will**, an oral declaration of the testator's testament (usually accompanied by a written memorandum thereof) made before a magistrate and by him recorded in the official records (*acta*).

(4) **Public written will** (*testamentum principi oblatum*), delivery of the testamentary document to the Emperor accompanied by a petition for its confirmation.

There were, besides, special regulations as to military testaments (in which all formal requisites were dispensed with) and as to wills made in the country (*ruri condita*) or made in the time of pestilence (*pestis tempore*).

(b) **Opening of a will.**—The witnesses, or the majority of them, were summoned and acknowledged their seals. The will was then opened and read publicly (usually in the forum or the basilica); a copy was then taken and the original sealed up and deposited in the archives. Any one who desired it could inspect a will and take a copy [Paulus Sent. Rec. IV. 6; and D. 29.3].

**275.** *Explain concisely by what three distinct kinds of restriction the free power of testamentary disposition was limited in Roman Law.*

I. All *sui heredes* (including posthumous children) and emancipated children must be expressly instituted heirs or disinherited.

II. The **legitima portio**, i.e., one fourth of what would accrue on intestacy (Justinian subsequently increased it, in the case of children, to one-third, and in some cases to one half), must be left to children, or in default of children to ascendants, and in some cases to brothers and sisters. If this was not done the will could be attacked as **inofficiosum**. After Justinian's legislation, if something had been left to such persons, an **actio in supplementum legitimæ** could be brought to have the *legitima portio* made

up, the *querela inofficiosi testamenti* being restricted to cases in which the claimants were passed over altogether.

The heir was also entitled to retain a fourth of the inheritance (**Quarta Falcidia** or **Quarta Pegasiana** or **Trebelliana**), but, after Justinian's legislation, he might be expressly excluded from this by the will, and he forfeited this right if he did not make an inventory on entering on the inheritance.

III. The heir and the persons taking benefits under the will must have *testamentifactio*, i.e., the heir must be legally capable of acting as heir, and the legatees and other beneficiaries be legally capable of taking under the will.

**276.** (a) "Every will made by a man . . . shall be revoked by his . . . marriage" (*Wills Act*, s. 18). Was this ever true in Roman Law?

(b) "No will made by any person under the age of twenty-one years shall be valid" (*ibid.*, s. 7). Compare this with Roman Law.

(a) In early Roman Law if a wife came, on marriage, into the *manus* of her husband, a will previously made would be invalid as this would involve the agnation of a new *suus heres*. With the disappearance of *manus* marriage would have no effect on a previously made will.

(b) In Roman Law males, if *sui iuris*, could make a will at the age of fourteen and females at twelve. A *filius-familias*, however, could only dispose of his *peculium castrense* and *quasi-castrense*; and until the disappearance of the *tutela mulierum* a woman could only make a will with the *auctoritas* of her guardian.

**277.** Enumerate the conditions necessary to make a valid Testamentum, and show which of them could be dispensed with in case of *Fideicommissa*.

**Conditions for valid will.**—(1) The testator must have *testamenti factio* (see 269), and so must the witnesses,

heirs, and legatees; (2) he must institute his heir properly according to law; (3) he must make his will with all the legal formalities; (4) he must disinherit or make heirs certain of his family; (5) he must provide for certain persons. (See 275.)

**Fideicommissa** were directions to the heir (testate or intestate) to deal with the property according to the desires of the person expressing them: (a) These directions might be given in a *testamentum* or in a codicil; and the codicil might either exist by itself without a will, or it might be supplementary to a will. If there were a testament, then the heir instituted had to execute the *fideicommissa*; if there were no testament, then the heir *ab intestato* executed the directions. Usually the *fideicommissa* were contained in codicils. These codicils required no formalities in their execution; but in later law, five witnesses were required if there was not a will. This formality was not absolutely indispensable, because a supposed beneficiary could put the heir on oath to disclose any directions he might have received, or to deny that he had received any. (b) The beneficiary need not have *testamenti factio*: most of those who were incapable of taking as legatees could take under a *fideicommissum*. (c) An heir could not be instituted or a person disinherited by *fideicommissa*.

**278.** *Specify the conditions necessary to make a Testamentum valid at the time of making it. By what events might it be subsequently invalidated, and how far could provision be made against those events?*

See 277.

The will might be invalidated: (a) By the testator losing the right to make a will at the time of his death (or even during the intervening period, according to the *ius civile*). This was incapable of being remedied. (b) By the incapacity of the heir at the time of the testator's death. This could only be guarded against by substituting in the will

another heir to fill the vacancy that might possibly be created. (c) By any person subsequently becoming a *suus heres* of the testator (*postumi*). This might be guarded against by disinheriting such person in advance. The **lex Velleia** enabled this to be done when there was a possibility of the will being invalidated through a *suus heres* (e.g., a son) dying so as to let in the grandchildren who, thus becoming *sui heredes*, ought to be made heirs or disinherited.

**279.** *What was meant by Common and Pupillary and Quasi-Pupillary substitution?*

**Substitutio vulgaris** was a conditional institution of an heir by which the testator might provide against the heir nominated failing to act: e.g., "Let Titius be my heir; and if he shall not be my heir let Mævius be my heir."

**Substitutio pupillaris.** When the heir appointed was a child under puberty and in the power of the testator, the testator might in this way provide against the contingency of the child dying before attaining the age of puberty and so being unable to make a will; e.g., "Let Titius, my son, be my heir, and if he does not become my heir, or becoming my heir he dies before he is able to make a will, let Mævius be my heir." **Substitutio quasi-pupillaris** or **exemplaris.** In this way an ascendant could provide against the contingency of his insane children, grandchildren, or great-grandchildren, dying before being able to make a will for themselves, although beyond the age of puberty.

**280.** *To what extent was a Heres liable for the payment of debts and legacies where the estate of the testator was insufficient for that purpose?*

Originally, he was liable for the debts of the testator, not only so far as the estate would go, but personally. He was liable for legacies only to the extent of the estate. The **lex Falcidia**, to induce the heir to enter, gave him a fourth of the

net proceeds of the estate after payment of debts, funeral expenses, and the expenses of manumitting slaves, but it did not otherwise limit his liability. Justinian introduced the **beneficium inventarii**. If the heir made an inventory of the estate on entering, he was liable only so far as the estate would go, but if he failed to do this, he became liable personally for any deficiency, and was compelled to pay even the legacies which the estate would not bear.

**281.** *Describe the liabilities of a Heres before and after the introduction of inventories.*

*Before*, he was bound to pay all debts, whatever the value of the estate, and all legacies, and *fideicommissa* as far as the estate would go, but no further. The *lex Falcidia*, however, gave him a clear fourth of the estate, after deductions of debts, funeral expenses, and the cost of manumitting slaves under the will. The *Sc. Pegasianum* also gave him a similar fourth where the estate was disposed of by *fideicommissa*. See **319**.

*After*, if the heir made an inventory he was only liable so far as the estate went; if he did not do so, he was personally liable for all debts and legacies.

**282.** *Who were Sui Heredes? What rights had they of succession to a deceased person's property? Could such rights be excluded, and if so, in what way?*

**Sui Heredes** were all those persons in the power of a father who became *sui iuris* at his death. They had the right to share the estate on intestacy. If a will were made they must be either instituted heirs or expressly disinherited. Besides this they were entitled to have left to them a fourth of what they would have had on intestacy. If this were not done they might, originally, have upset the will by an **actio de inofficioso**; in later law this action only lay when nothing at all had been left them: if they received something, they had the **actio in supplementum**

**legitimæ** to make up the difference between what they actually received by the will and a fourth of what they would have received on intestacy. See 289.

**283.** *What class of persons were included under the term Sui Heredes? What was their legal position? A. makes a will, and subsequently adopts B. (a stranger), and C. (a grandson) as sons. Is the will affected, and, if so, how? Can A., in making the will, prevent the Adoptio affecting the will?*

See 282.

The adoption of B. would, prior to Justinian, create a new *sui heres*, and in consequence the will would be rendered void (*ruptum*). Under Justinian the adoption would have no effect, because B. would not become a *sui heres*. The adoption of C. by his ascendant would have the effect of invalidating the will at both periods of law. There was no method by which such a contingency might be avoided, but in later law if a person did anticipate the adoption of a person who would thereby become his *sui heres*, he might institute him though he could not disinherit him.

**284.** *What rules ought to be observed by a testator as regards the legal claims of the Heres or relatives to a share of the inheritance?*

**285.** *Give an account of the provisions from time to time in force for the protection of children against being unjustly disinherited.*

**286.** *Explain the rule that prevented the total disinheritance of children by their parents.*

1. If the children were not instituted as heirs in a will they must be expressly disinherited or the will was void. By the *ius civile* this rule applied to *sui heredes*, including

*postumi* and adopted children. In the time of Justinian this rule was extended to all descendants of the testator through males, including *postumi* and emancipated.

2. Besides this the testator must leave to his children or parents, or, in some cases brothers and sisters, a **legitima portio**, *i.e.*, one fourth of what they would take upon intestacy. If, prior to Justinian, he left less than this fourth, or, after Justinian, he left nothing at all, the person aggrieved might bring an *actio de inofficioso* to set aside the will on the fiction that the testator was insane. If, however, anything at all was left, Justinian only allowed an *actio in supplementum legitimæ*, or an action to supplement what was bequeathed to the extent of the *legitima portio*.

**287.** *What claims had the members of a testator's family to a share in the inheritance? What was the effect on a will of non-recognition of such claims? How could such claims be enforced?*

**288.** *What restrictions did the Roman Law place upon a father's power of disinheriting his children?*

Originally a testator had to disinherit expressly, or to name as heirs, all who were in his power (even *postumi*, *i.e.*, those born after the making of the will), and became *sui iuris* at his death. These were called **sui heredes**. In Justinian's time he had to appoint as heirs or expressly disinherit all his descendants through males, including *postumi* and emancipated, whether they were *sui heredes* or not. If this were not done the will was avoided. Again, prior to Justinian, if the testator did not leave his children, or parents, or, in some cases, his brothers and sisters, one fourth of what they would have been entitled to on intestacy, they might attack the will as *inofficiosum* on the ground that he must have been insane, or he would not have been guilty of such a dereliction of duty to them. In Justinian's day the *actio de inofficioso* only lay where the

persons entitled had received nothing at all by the will. If they had received anything they had an *actio in supplementum legitimæ* in order to make up the *portio legitima*, i.e., the one fourth of what was receivable on intestacy.

**289.** Write a general account of the *querela inofficiosi testamenti*.

What changes did Justinian introduce into the law de *inofficioso testamento*?

The **querela inofficiosi testamenti** was an action which could be brought by descendants, ascendants, and where turpes persone had been appointed heirs, by brothers and sisters, to set aside a will from which they had been unjustly excluded or omitted. The action had to be brought within five years of the testator's decease. It came before the centumviral court [while that court was in existence] and was based on a presumption of the testator's insanity at the time of the making of the will. If the action was successful, the will was declared void and the heirs *ab intestato* succeeded to the estate.

The action could only be brought as a last resource, in the absence of any other mode of obtaining recognition of the claim. If the testator had left to the claimant a sufficient part of his property, by legacy, *fideicommissum*, or otherwise, or if the claimant could obtain it, in some other way, e.g., by *bonorum possessio contra tabulas*, the action was not available. The amount of this part was not at first determined, but by analogy to the Falcidian Fourth, it was eventually fixed at *one-fourth*, and was termed the **legitima portio**, i.e., the portion due by law.

Justinian restricted the action to cases in which the claimant had received nothing at all from the testator. If he had received something, his remedy was to bring the new action in **supplementum legitimæ**, introduced by Justinian, by which he could have the *legitima portio* made up to him, but which left the will in other respects standing.

Justinian also increased the amount of the *legitima portio* by enacting (Nov. 18. 1) that if a man had less than five children he must leave them, in equal shares, at least *one-third* of the inheritance; if five or more, at least *one-half*.

**290.** *Describe fully the points in which the several classes of heirs differed from one another?*

1. **Heres necessarius.**—This was the slave of the testator whom he had made heir. He was bound to enter on the inheritance, but the prætor gave him the **beneficium separationis**, i.e., the right of keeping any acquisitions made by him after the testator's death separate from the inheritance. He was generally appointed to an insolvent estate which nobody else was likely to accept. 2. **Heres suus et necessarius.** A *suius heres* who was appointed heir. At first he was bound to enter (hence *necessarius*), but the prætor gave him the **beneficium abstinendi** or the privilege of refusing the inheritance. 3. **Heres extraneus.** Any other person appointed heir. He was required to definitely accept the inheritance, otherwise he was taken to have declined it.

**291.** *What rules governed the vesting of an inheritance in the heir?*

**Vesting of the inheritance.**—The *necessarius heres* (see 290), was obliged to take the inheritance. It vested in him immediately the testator died. No acceptance was necessary. The *suius et necessarius heres* might abstain from the inheritance if he did not interfere with it. He must signify his refusal, otherwise the inheritance vested in him. The *extraneus heres* had to formally accept before the inheritance vested in him. He had a period in which to deliberate (*spatium deliberandi*). Justinian generally allowed not more than nine months. If the appointed heir did not declare before that time, he was taken to have (a) *rejected*, if the action to compel decision were

brought by substituted heirs or by heirs *ab intestato* ;  
(b) *accepted*, if the action were brought by legatees or creditors.

**292.** *A testator makes Gaius heres ex quadrante, Titius heres ex quincunce, Lucius heres ex semisse, Gnaeus and Publius co-heredes without specifying their shares. What portion of the inheritance does each party take ?*

In the division of an inheritance between two or more co-heirs, the inheritance was treated as an *as* and the shares were expressed by the fractions of the *as*. If *all* the shares were specified, the *as* was calculated with reference to the total arrived at by adding the fractional parts together. If the shares of some only were specified, those whose shares were not specified took in equal proportions the difference between the sum of the shares assigned and twelve ; or if the fractional parts assigned exceeded twelve, the difference between that sum and the next multiple of twelve over that sum. In the question, the testator has made Gaius heir to three parts, Titius heir to five, and Lucius to six, fourteen parts in all. Hence, Gnaeus and Publius will each take half of the difference between fourteen parts and twenty-four, that is, five parts each (*ex quincunce*).

**293.** *What were the chief changes made by Justinian in the law of wills ?*

1. He abolished the distinctions between the four forms of legacies, giving to the legatees real or personal actions to recover the legacy according to the nature of the subject-matter thereof. 2. He abolished the distinction between legacies and *fideicommissa*, so that dispositions invalid as the former might be binding as the latter. 3. He combined the effects of the *Sca. Trebellianum* and *Pegasianum*, giving the heir the benefits of both. 4. He introduced the *beneficium inventarii*, by which an heir, making an

inventory of the estate, was protected from liability beyond the amount of the assets of the inheritance. Neglect to make an inventory made the heir personally liable for all the debts and legacies. 5. He allowed the heir to be named in any part of the testament. 6. He required all children, whether *sui heredes* or emancipated, and whether born or only conceived, to be instituted heirs or disinherited by name. 7. He allowed the *actio de inofficioso* to be brought only by those to whom nothing had been left in the will. If anything were left them they had the *actio in supplementum legitimæ* to make up the *legitima portio*. 8. He gave testators power to deprive their heirs of the Falcidian Fourth.

**294.** "*Voluntas militis summa lex.*" Explain this, distinguishing particularly various relaxations granted to soldiers in respect of (1) the form, (2) the substance of testaments.

**Soldiers' wills.**—Any expressed intention of a soldier was sufficient to constitute a valid will. Soldiers were not required to conform to the ordinary rules of law in the making of their wills. This privilege lasted so long as they were on military service, and for one year after their discharge.

(1) *Form*: (a) any expression of testamentary intentions was sufficient: but, if oral, two witnesses were necessary; (b) any words sufficed to institute the heir; (c) an informal will became valid if a person subsequently becoming a soldier expressed his intention to that effect; (d) they need not disinherit their children; (e) they could dispose of their inheritance by codicils.

(2) *Substance*: (a) they might dispose of part only of their property, and so die partly testate and partly intestate; (b) they might appoint as heirs persons not having *testamenti factio*; (c) the *lex Falcidia* did not apply; (d) they could make wills for their children without making one for themselves.

295. *Quibus Modis Testamenta Infirmantur.* Summarize this title.

296. When was a Testamentum said to be (1) *Ruptum*, (2) *Irritum*, (3) *Non Iure Factum*? State the legal results in each case.

**Iniustum; non iure factum; imperfectum; nullius momenti**; denoting that the will was void as a testament owing to some rule of law relating to its execution having been broken, or to some lack of essential formality. **Ruptum**: the original will was valid but had been revoked by the making of a subsequent will, or by the subsequent agnation of a *suus heres*. **Irritum**: rendered useless through the testator having suffered *capitis deminutio*. **Destitutum**: abandoned by the heir not entering. **Rescissum, inofficiosum**: rescinded through an *actio de inofficioso* being successfully maintained.

297. Consider the effect on a will, of the testator

- (a) Giving himself in adoption.
- (b) Marrying.
- (c) Incurring a *Capitis Deminutio*.

(a) The will is invalidated (*irritum*) by the testator undergoing the change of *status* which is the necessary result of his adoption. (b) No effect: he undergoes no change of *status* and the wife has no legal claims requiring recognition in the will (unless the wife come into his *manus* when the will would be *raptum*). (c) The will was invalidated (*irritum*). In the first and last cases, whilst by the *ius civile* the will was of no effect, the prætor would give *bonorum possessio secundum tabulas*, provided that the testator had resumed his original *status* at the time of his death. (J. 2. 17. 6.)

298. When and how does the property in the thing given by a legacy vest in the legatee?

Before the alteration of the law by Justinian this would depend upon the form of the bequest. There were four **forms of legacies**: (1) **Per vindicationem**, *e.g.*, "I give and bequeath my slave to Titius." Immediately the heir entered, Titius would have a real action (*vindicatio*) to obtain the slave, whoever might then have the slave in his possession. The property in the thing given by the legacy vested as soon as the heir entered. (2) **Per damnationem**, *e.g.*, "Let my heir be condemned to give my slave to Titius." Here the legatee had a personal action to compel the heir to give the slave to him, but he did not become the owner of the slave until it was actually conveyed to him. (3) **Sinendi modo**, *e.g.*, "Let my heir allow Titius to take my slave." Here again there was only a personal action against the heir, and Titius became owner as soon as he received the slave. (4) **Per præceptionem**; *e.g.*, "Let Titius my heir take my slave before dividing the inheritance." This was a form used when the testator gave a legacy to one of his heirs of some part of the inheritance which was to be taken by him over and above his share of the inheritance. The legatee did not become owner until he actually received the slave through the action for the division of the inheritance (*iudicium familiæ erciscundæ*). The **Sc. Neronianum** (A.D. 64), enacted that a legacy made in any of the recognised forms, if not valid in the form adopted, should be construed as a legacy *per damnationem*; and subsequently Constantius and Constans (A.D. 339) appear to have dispensed with the necessity of using the traditional solemn form of words in a bequest. Justinian abolished any distinctions surviving between the different classes of legacies and assimilated legacies as far as possible to trusts, giving in each case a vested interest enforceable by real action against the heir where the subject-matter of the bequest belonged to the testator and was specific; and in other cases imposing an obligation on the heir enforceable by personal action.

**299.** *What were the different kinds of legacies in the time of Justinian? Explain the terms "Dies Venit," "Dies Cedit," in relation to legacies.*

The four forms of legacies, *per vindicationem*, *per damnationem*, *sinendi modo*, and *per preceptionem*, still existed, but all differences of effect were abolished by Justinian.

"**Dies cedit**" was the day when the right accrued to the legatee; in the case of pure and simple legacies, or those payable after a fixed term, this was on the death of the testator. In the case of a condition imposed, on the happening thereof.

"**Dies venit**" was the day when the legacy was demandable; that is, after the *aditio* or entry by the heir, or upon the fulfilment of the condition (if any) imposed.

**300.** *State and exemplify the several ways in which a legacy could be revoked.*

A legacy might be **revoked** :

I. Expressly (a) in a subsequent will or codicil, *e.g.*, by words expressing a contrary intention or by directing the transfer of the thing bequeathed to another person, (b) by erasing the disposition from the will.

II. By implication, *e.g.*, (a) by alienation of the thing bequeathed during the testator's lifetime, (b) if serious enmity arose between the testator and the legatee.

A legacy might lapse (a) by death of the legatee before the legacy vested, (b) by want of capacity to take (*testamentifacio*) on the part of the legatee.

**301.** *Aulus bequeaths (a) to his wife Aula a sum which exactly represents the value of her dos, (b) to a creditor, Balbus, 100 aurei. What principles apply to these legacies?*

(a) The legacy takes effect; because, although it operates as a satisfaction of the liability to restore the dowry, the

legacy is more advantageous, seeing that it can be claimed at once, while the heir is allowed a year for restitution of the *dos*.

(b) If the legacy does not exceed the debt due to Balbus it is void, unless the legacy is unconditional and the debt either conditional or payable at a future time. The bequest is presumed to be in satisfaction of the debt, and the creditor, except where the legacy exceeds the debt or the latter is only payable after an interval or conditional, does not receive any benefit.

The principle involved is that some benefit to the legatee is essential to the validity of a legacy; and also that, in the absence of proof to the contrary, a debtor is not presumed to make a gift.

**302.** *What changes were introduced by Justinian simplifying and improving the law of legacies?*

Justinian's changes were as follows:

I. He abolished what remained of the distinctions between the four forms of legacies in use in the time of Gaius and enacted that all legacies should be subject to the same rules and might be recovered by real or personal actions according to the nature of the subject-matter.

II. He put legacies on the same footing as *fideicommissa* and provided a more effectual means of securing the discharge of the latter. In default of other proof, the person burdened with a trust might be subjected to an oath to disclose the extent of his trust.

III. He abolished some of the restrictions as to persons to whom legacies could be given, *e.g.*, he allowed legacies to be given to *postumi alieni*.

IV. He also abolished various technical restrictions connected with legacies, *e.g.*, legacies given by way of penalty, legacies bequeathed in a will before the institution of the heir, and sundry others, previously invalid, were made effectual.

V. In the case of a legacy left jointly or severally to two or more persons, he provided that in all cases such a legacy should be divided, and that a lapsed portion should accrue to the co-legatees.

**303.** *Compare donatio mortis causa with legatum.*

The rules affecting *donationes mortis causa* and legacies were the **same** on the following points:

I. The rules of the *leges Furia* and *Voconia* applied to both.

II. The *leges Iulia et Papia* as to capacity to take, and the *lex Falcidia* as to deduction of a fourth by the heir, applied to both.

III. Both were subject to the rights of the creditors where the estate was insolvent.

IV. Both were subject to the rights of the patron in the case of a freedman's inheritance.

V. Both were avoided by a capital condemnation.

*Donatio mortis causa* **differed** from a legacy as follows:

I. It was independent of the acceptance of the inheritance.

II. *Testamentifactio* was not necessary in either donor or donee.

III. It was not affected by the *querela inofficiosi testamenti*.

IV. The *regula Catoniana* did not apply, as the capacity of the donee to receive was only determined at the death of the donor.

**304.** *Distinguish between the position of an heir and that of a legatee in Roman Law. How were the following persons able (if at all) to protect themselves from loss in consequence of the fusion of the legal personalities of the heir and the*

*deceased: (a) the heir himself, (b) his creditors, (c) the creditors of the deceased?*

The heir was a universal successor either (a) under a will, or (b) on intestacy. He succeeded to all the rights of the deceased, but at the same time was subject to all his liabilities (until the great change effected by Justinian by the introduction of the **beneficium inventarii**).

The legatee, on the other hand, was a singular successor and became entitled under a will only. He incurred no liabilities unless incident to the thing bequeathed.

(a) Prior to Justinian's legislation, the heir could only protect himself from loss, if the inheritance was insolvent, by refusing to accept or make *aditio*. After the introduction of inventories by Justinian the heir could protect himself from liability by claiming the **beneficium inventarii**.

(b) The creditors of the heir could not protect themselves against the acceptance of an insolvent inheritance by the heir. Acceptance of an insolvent inheritance was regarded in the same light as the incurring of any other debt. [D. 42. 6. 1. 2.]

(c) The creditors of the deceased could apply for a **separatio bonorum**, i.e., an order that the property of the deceased should be treated as separate from that of the heir, the effect of which was that the creditors of the heir could not claim to be paid out of the inheritance until all the creditors of the deceased had been paid in full.

**305.** (1) *How, if at all, could the creditors of a solvent inheritance protect themselves against the effects of the insolvency of the heir?* (2) *How, if at all, could a solvent heres institutus protect himself against the insolvency of the inheritance (a) before entry, (b) after entry?*

**306.** *A Roman citizen, Aulus, died intestate: Balbus, an insolvent, was his heir. What steps could Aulus' creditors*

take to protect their interests in Aulus' estate from Balbus' creditors?

(1) The creditors could obtain the **beneficium separationis** by applying to the magistrate for an order to have the property of the deceased dealt with separately (*separatio bonorum*). The application must be made within five years of the acceptance of the inheritance.

(2) (a) Prior to Justinian's legislation, the heir, if a *suus heres*, could only protect himself by claiming the **beneficium abstinendi**, or, if an *extraneus heres*, by refusing to enter; or, in either case, by arranging with the creditors, before accepting, to limit their claims to the actual assets and then taking up the inheritance as their agent (*mandatarius*), in which case they were bound to indemnify him against loss. (b) After entry, prior to Justinian's legislation, the heir could not protect himself. He undertook all the liabilities of the testator. After Justinian's legislation, he could in all cases protect himself by claiming the **beneficium inventarii** and making a complete inventory of the property, to be commenced within one month of his becoming aware of his rights and completed within two months more, or, if he were at a distance, within one year.

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307. "A succession can be accepted absolutely, or under benefit of inventory" (Civil Code of France, Art. 774). Trace this rule to its historical origin, and explain it.

This rule is derived from Justinian's legislation, introducing the *beneficium inventarii*.

The person instituted heir in a will or entitled to succeed on intestacy was given the option between claiming an interval for deliberation (*spatium deliberandi*)—a privilege introduced by the Prætor's edict—in which case, if he accepted the inheritance, he became liable to pay all the debts and also legacies and *fideicommissa* in full and could not claim the Falcidian or Trebellian Fourth, or to enter

under benefit of inventory, in which case he was required to make a complete inventory of the property within a certain period—usually three months—and then was not liable beyond the amount of the assets. If the heir declined the inheritance, the creditors or beneficiaries, on giving him an indemnity, could compel him to enter *pro forma*.

**308.** *What was Substitution proper in Roman Law? Compare it with Pupillary Substitution. What was Quasi-pupillary Substitution? Where do you find in Roman Law the origin of the "Substitution" which in certain modern systems is the equivalent of the English "entail"?*

**Substitution proper (vulgaris)** was the nomination in a testament of one or more heirs to take the inheritance as substitutes in the event of the refusal or failure of the heir or heirs instituted in the first place, *e.g.*, "If Mævius shall not be heir, let Titius be heir."

**Pupillary substitution** was the nomination of an heir to take on the death, before reaching puberty, of a child under power of the person making the disposition. It was not necessary that the child should be instituted as the parent's heir, but the substitution must be made in a valid testament. It was, in effect an expedient by which a father could make a will for his child under puberty, for the substitute on the death of the *impubes* succeeded to his inheritance (including that of the father if the child had been instituted heir).

Substitution proper only took effect if the nominated heir failed to take the inheritance. Pupillary substitution took effect whether the child was instituted heir to the father or not, and, if instituted heir, even though he had entered on the father's inheritance. [G. II. 179, 182—3.]

**Quasi-pupillary substitution (exemplaris)** was the appointment of an heir to a child or other descendant, even over the age of puberty, who was lunatic. It was introduced by Justinian and was allowed to ascendants of either

sex, being independent of *patria potestas*. The heir must, however, be selected from the descendants of the lunatic, or, in default, from his brothers or sisters and their descendants; it was only in default of both that the selection was free.

The origin of the Substitution which in modern systems derived from Roman Law is used for the purpose of settling property is to be found in the **Fideicommissary Substitution** of Roman Law, by which the heir might be charged to hand over the inheritance either during his lifetime or on his death to another; in the latter case the trust disposition being binding on his (the heir's) heir.

**309.** *A Roman citizen desired to devise an estate in strict settlement to his son, and then to that son's son, and so on. How far could he carry out this wish, supposing him to die* (1) A.D. 100, (2) A.D. 600?

(1) In A.D. 100, a *fideicommissum* could be constituted in favour of, but apparently could not be imposed on, an *incerta persona* (G. II. 287). A descendant born after the death of the testator [except in the case of a *postumus Aquilianus* (see Poste, p. 223)] was regarded as an *incerta persona*. Consequently the testator could settle the estate to pass successively by way of *fideicommissum* or trust to any descendants born during his lifetime and to the son of the last survivor of such descendants, but (probably) not further. A Sc. under Hadrian avoided *fideicommissa* made in favour of *incertæ personæ* (G. II. 287).

(2) In A.D. 600, the property could be strictly settled within the family (but not in favour of outsiders) by imposing a trust on the successive descendants not to alienate the property but to bequeath it to their children. A limitation had been placed on this power, however, by Nov. 159. 2, which enacted that the fourth holder should be discharged from the trust.

**310.** *How could the owner of a house at Rome settle it upon his son A. for life, and after A.'s death upon A.'s descendants?*

See **309.**

**311.** *A testator bequeaths the following legacies:—(1) To A. a thing pledged to B.; (2) To C. an article that the testator subsequently sells; (3) To D. an article that belongs to B. What right in each case does the legatee acquire?*

(1) The legatee might require the heir to redeem the thing, if the testator knew that it was pledged. (J. 2. 20. 50.) (2) If the intention of the testator had been to revoke the legacy, C. would take nothing; otherwise he would be entitled to the thing, or its value, from the heir. (*Ib.* 12.) (3) The legatee D. would have an action against the heir for the thing bequeathed or its value. In this action D. would have to prove that the testator knew that the thing belonged to another. The thing must also be a commerciable article, otherwise the heir was not bound to pay its value. (*Ib.* 4.)

**312.** *State shortly the provisions of the lex Falcidia.*

The **lex Falcidia** gave to the heir, as an inducement to him to enter on the inheritance, one clear fourth of the net proceeds of the estate after deduction of debts, funeral expenses, and expenses of manumitting slaves.

**313.** *Consider the following case, giving reasons for your conclusions: A testator bequeaths a slave as a legacy, but by mistake describes the slave by a wrong name. Is the legacy valid?*

Provided that the identification is complete and the intention of the testator is clear, the legacy is good. **Falsa demonstratio non nocet.** If it be impossible to say which slave was meant, the legacy would be void.

**314.** *What was the extent of a slave's enjoyment of his Peculium? State the rules applicable to (1) institution of, (2) a legacy to, a Servus Alienus.*

The slave's *peculium* was recognised as his property by custom, though not by law. It consisted of anything which the master allowed the slave to keep as his own, but this peculiar privilege could be destroyed at any moment by the master's expressed intention to that effect. The slave had the power of alienating the *peculium*, and it was answerable for debts contracted by the slave. In the latter case the creditor's action was *de peculio* against the master, who, before satisfying the creditor's claim, could deduct anything due to him from the slave, unless the debts incurred by the slave had been incurred in a business carried on by him with the permission of his master.

*Institution of the slave of another.*—(1) The slave would enter upon the inheritance by the order of, and would acquire it for, that master in whose power he was at the time of entering. He could not enter without the consent of the master, because such entry created liabilities as well as rights. (2) If, before entry, the slave had been manumitted, he could enter or not as he pleased, and what he acquired would be his own. (J. II. 14. 1.)

*Legacy to the slave of another.*—The slave acquired the legacy for the master in whose power he was at the date of the testator's death. He did not in this case require the permission of the master before accepting, because a legacy is a lucrative thing, and, therefore, for the benefit of the master.

**315.** *Give some account of the history, nature, and effect of Codicilli.*

**316.** *When and for what purposes were Codicilli introduced? What rules were applicable to Codicilli when they were used*

(1) *as a substitute for*, (2) *as an addition to Testamenta*? In what respects did they differ from wills?

**Codicilli** were informal testamentary dispositions to which legal effect was first given by the Emperor Augustus. They were introduced as a convenience to persons travelling, who might find it difficult to make a formal will. The codicils contained requests or directions (*fideicommissa*) which were binding upon the heir whether under a will or *ab intestato*. When used as a substitute for a will the heir *ab intestato* was charged with the duty of executing the trusts. Five witnesses were at one time required, but the rule was not a strict one, and beyond this there was no formality.

When used as an addition to *testamenta*, the heir under the will had to see that the directions in the codicil were carried out. If a codicil preceded a will it ought to be ratified in the will; but even if this were not done the beneficiary under the codicil might take if it were clear that the trust was not revoked by the will (J. 2. 25. 1.). A codicil with a will stood or fell with the will; if the will became invalid so did the codicil.

**Codicilli differed from wills** in that (1) no formalities were requisite (except, later, five witnesses); (2) they could not dispose of the inheritance by appointing an heir; (3) a legal tutor could not be appointed by them; (4) there might be several codicils, but only one will; (5) they could exist without a will; (6) the *lex Falcidia* did not apply to them.

**317.** Define a *Codicillus*. Distinguish it from a *testamentum*. What form (if any) was necessary to make a valid *Codicillus*? How did *Codicilli* modify the law of wills?

See 315.

No form was necessary, but five witnesses were required by enactments of Constantine, Theodosius II., and Justinian. Even this was not absolutely necessary in the time of Justinian, for the heir could be put upon his oath to swear

that he had received no directions from the deceased. Codicils modified the law of wills by avoiding the effects of a lack of formality; and a clause (**clausula codicillaris**) might always be inserted in a will to the effect that if the document should be invalid as a will it should operate as a codicil. The *fideicommissa* created by codicil were in later law effectuated as fully as legacies, and by their means persons otherwise incapable of taking the benefit of testamentary dispositions could be provided for. In this way, also, executory interests might be created, *e.g.*, I bequeath my farm to Titius, and on his death to Seius.

**318.** *What were the nature and object of Fideicommissa? Show how the law of wills was affected by them.*

**Fideicommissa** were requests to the heir (under a will or *ab intestato*) or to anyone taking under a will to conform to the directions of the testator or intestate, as the case might be. They might consist of (a) directions to the heir to hand over the whole of the inheritance to a person named (**fideicommissa hereditatis**); (b) directions to the heir or a legatee to hand over a particular thing to another (**fid. singulæ rei**). They might be contained in a will, or in a codicil supplementary to an existing will, or in a codicil existing without a will. In the two first cases the heir under the will had to see to their execution, in the last the heir *ab intestato* was responsible. Their objects were chiefly to evade the technicalities of the law relating to wills, and to enable persons to be provided for who could not take under wills by the *ius civile*. No particular form of words was necessary; nor did the codicil, by which the *fideicommissa* were often created, at first require any formalities in its execution; five witnesses were subsequently required. The *lex Falcidia* did not apply to *fideicommissa*, but in reference to them a similar provision in favour of the heir was introduced by the *Sc. Pegasianum*. Justinian assimilated the rules relating to legacies and *fideicommissa*, giving the former all the privileges of the latter.

**319.** *State the provisions of the Sc. Trebellianum and Pegasianum and explain the nature of the mischiefs they were intended to remedy.*

The heir, who had to hand over the whole or part of the inheritance under a *fideicommissum*, originally protected himself against liabilities by stipulating with the *fideicommissarius* (the beneficiary) for an indemnity against the liabilities of the inheritance or a proportionate part thereof, and at the same time promised to transfer in accordance with the trust direction: *stipulationes partis et pro parte*. By the **Sc. Trebellianum** (A.D. 62) this was rendered unnecessary. The *fideicommissarius* alone was henceforth to be liable on and take over the actions affecting the estate or the portion thereof transferred to him. The object of the *Sc.* was to induce the heir to enter and execute the *fideicommissa*. This was found insufficient, and consequently the **Sc. Pegasianum** was passed, giving the heir one fourth of the inheritance in the same way that the *lex Falcidia* gave him a fourth of the estate which he had to distribute under a testament. If the heir took advantage of the *Sc. Pegasianum*, however, he remained liable for all claims against the estate, and consequently was obliged to have recourse to stipulations of indemnity to protect himself. Justinian enacted that he should take his fourth, and that the liabilities should be divided between the heir and the *fideicommissarius* in proportion to their shares. The heir was compelled to enter. Justinian combined the effects of the two *senatusconsulta*, the joint enactment being then entitled the **Sc. Trebellianum**.

**320.** *A. appoints B. to be his heir, and charges B. by way of trust to hand over the inheritance to C. What is the position of B. and C. as regards the right to the inheritance and as regards creditors?*

B. would be compelled to hand over the inheritance to C. but would remain liable at law for the debts of the estate. Originally he protected himself by stipulating with the

*fideicommissarius* for an indemnity against claim made on him, he at the same time agreeing to hand over everything he received as part of the estate. Subsequently, the *Sc. Trebellianum* (A.D. 62) rendered this agreement unnecessary. The *fideicommissarius* took the place of the heir, and if the latter were sued by the creditors he might plead that he had handed over the inheritance. The *Sc. Pegasianum* (A.D. 70—76) enabled the heir charged with handing over the estate to retain a fourth, but he became liable for all the debts of the inheritance. To protect himself he entered into the stipulations *partis et pro parte* as before described, by which he and the *fideicommissarius* became liable for a proportionate part of the debts. Justinian combined these two *Scæ*. The heir was bound to enter, he took his fourth, but each was liable only for his proportion of the debts.

**321.** “Children in the first degree, whose inheritance was burdened with a general *fidei-commissum*, were (prior to 1873) entitled to the deduction of the legitimate and Trebellian portions, which together (where there were not more than four children) constituted one half of the property entailed” (*Cape Colony Notary's Manual*). Explain this by reference to the Roman Law as left by Justinian.

After Justinian's legislation, the heir, in the case of an inheritance burdened with *fideicommissa*, was entitled to deduct a clear fourth, known as the **Trebellian Fourth** [from the *Sc. Trebellianum*, which replaced the earlier *Sc.* of the same name and the *Sc. Pegasianum*]. The children of the testator, if not named heirs, were also entitled to one-fourth of what they would be entitled to on intestacy (called **legitima portio**) and could enforce their claim by an **actio in supplementum legitimæ**, if something had been left to them, or, if they had been passed over altogether, by an **actio de inofficioso testamento**. Justinian's later legislation required the testator to leave at least one-third of the inheritance to his children, if less than five in number, or at least one-half if there were five or more.

**322.** *A modern writer, after describing the various pitfalls into which a Roman testator might fall, says that these dangers were made much less serious by the legalisation of codicilli, and of fideicommissa. Explain this.*

See **315 and 318.**

**323.** *A certain chapter in a treatise on modern Roman-Dutch Law is headed, "Of the Falcidian and Trebellian portions." What are these?*

See **312, 319 and 321.**

**324.** *In 1900 a case came before the Judicial Committee of the Privy Council which turned upon the question whether a certain disposition contained in a will made in Natal was a Common Substitution or a Fideicommissary Substitution. Distinguish the two.*

See **308.**

**325.** *The Code Civil of Lower Canada contains the following articles :*

"Art. 660.—In order to obtain **benefit of inventory** the heir is bound to demand it. . . ."

"Art. 775.—Children of a deceased person cannot claim **legitim.** . . ."

"Art. 925.—**Fiduciary substitution** is that in which the person receiving the thing, is charged to deliver it over to another, either at his death or at some other time."

*Give a general account of the Institutes of Roman Law which you take to be the origin of the Institutes of Canadian Law referred to above.*

(a) See **307.**

(b) See **287 and 289.**

(c) See **308.**

**326.** *Explain the following words and phrases: Collatio bonorum, Cretio, Hereditas iacens, Captatoria institutio,*

*Substitutio exemplaris, Quasi-postumi Velleiani, Leges caducariæ, Regula Catoniana.*

**Collatio bonorum.** "Hotchpot." Emancipated children, as a condition of being granted *bonorum possessio*, were obliged to bring into hotchpot, for general division, acquisitions made since their emancipation.

**Cretio** was a term applied to the obligation which might be imposed on an extraneous heir to make a formal election within a certain time whether he would accept the inheritance or not. *Cretio* was either *vulgaris* or *continua*. When it was *vulgaris*, the period (usually 100 days) was calculated from the time when the instituted heir became aware of his rights; when *continua*, the calculation was made from the death of the testator whether the heir was aware of his rights or not.

**Hereditas iacens** was an inheritance lying vacant, *i.e.*, in the interval between the death of the testator and the acceptance by the heir. It was for many purposes treated as a juristic person, *e.g.*, acquisitions might be made on its behalf.

**Captatoria institutio** was the appointment of a person as heir on condition that he appointed the testator or some other person indicated by the testator as heir in his will. Such an institution was illegal.

**Substitutio exemplaris.** See 279 and 308.

**Quasi-postumi Velleiani.**—Grandchildren, born before the making of the will, who, by the death of their father, become *sui heredes* of the testator. By the **Lex Iunia Velleia** testators were allowed to institute or disinherit such persons in their wills.

**Leges caducariæ.**—The laws dealing with lapsed inheritances and legacies, *i.e.*, the **Leges Iulia et Papia Poppæa**. See Appendix.

**Regula Catoniana.**—A rule laid down by one of the *Catos*. A legacy which would have been invalid if the

testator had died immediately after the making of the will was altogether invalid. It did not, however, apply to conditional legacies or to legacies to take effect after a certain time.

**327.** Give an instance of *Collatio bonorum* (hotchpot) in Roman Law.

An emancipated son on being admitted to a share in the paternal estate, on the death of the father intestate or on a grant of *bonorum possessio* when passed over in a testament, was obliged to bring into the father's estate for general division, *i.e.*, bring into "hotchpot," any property acquired by him after emancipation.

**328.** State the rules of Intestate Succession to a freeborn person—

(a) As found in the XII. Tables.

(b) As left by Justinian.

The order of intestate succession under the XII. Tables was—

I. *Sui hæredes*, *i.e.*, persons in the power of the deceased and first in degree in the family at the time of his death.

II. *Agnati* (nearest in degree), *i.e.*, relatives, who, if a common ancestor were still alive, would be in his power.

III. *Gentiles*, *i.e.*, the members of the *gens* to which the deceased belonged.

By Novels 118 and 127 Justinian remodelled the law on the subject, and laid down the order of succession as follows :

(1) Descendants (whether emancipated or not, adoptive or natural, male or female). If in the first degree they succeeded **per capita**, if in a more remote degree, they were entitled **per stirpes**.

(2) Ascendants together with brothers and sisters of the whole blood, if any, the succession being **per capita** and the ascendant nearest in degree excluding the more remote. If there were no brothers or sisters but two or more

ascendants in the same degree, some of the paternal line and some of the maternal line, the ascendants of one line took one half and those of the other line the other half.

(3) Collaterals.

Failing ascendants, the succession went to—

- (a) brothers and sisters of the whole blood and their children **per stirpes** ;
- (b) brothers and sisters of the half blood and their children **per stirpes**. But representation did not in either case extend to grandchildren ;
- (c) the nearest blood relation. If there were several in the same degree they succeeded **per capita**.

**329.** *What different classes of persons, excluded by the *Ius civile* from succeeding to an intestate citizen's inheritance, were admitted to the succession—*

(a) *By the Prætor's Edict ?*

(b) *By Imperial legislation ? How was their right to succeed enforced ?*

(a) *By the Prætor's Edict—*

(1) **Bonorum possessio unde liberi** was granted to emancipated children or other descendants who would have been *sui heredes* but for their emancipation, and also, in the case of the inheritance of an emancipated son, to children of the emancipated son who remained in the grandfather's power; subject to bringing into hotchpot (**collatio bonorum**) any property they possessed other than *peculium castrense* or *quasi-castrense*.

(2) **Bonorum possessio unde cognati** was given to blood relations in order of proximity, in default of *agnati* or if the nearest agnate refused the inheritance.

(3) **Bonorum possessio unde vir et uxor** conferred on husband and wife reciprocal rights of succession in default of *cognati*.

(4) In the succession to emancipated children, *bonorum possessio* was given to ten classes of near relatives in preference to a stranger patron (**unde decem personæ**); and in the succession to freedmen, in default of children and the patron and his children, to (i.) the nearest member of the family of the patron (**tum quem ex familia**), (ii.) the descendants and ascendants of the patron (**unde liberi patroni patronæque et parentes eorum**), (iii.) the husband or wife of the deceased (**unde vir et uxor**), (iv.) all blood relations of the patron in order of proximity (**unde cognati manumissoris**).

(b) *By Imperial legislation—*

By the **Sc. Tertullianum** mothers having the *ius liberorum* were allowed to succeed to their children in default of children, father, or brothers of the deceased, to the exclusion of other agnates. If there were sisters of the deceased, the mother shared equally with them. Certain minor changes were subsequently made in the mother's position. Justinian abolished the requirement of the *ius liberorum* and put all mothers on the same footing. By the **Sc. Orphitianum** children were allowed to succeed to their mother in preference to brothers or sisters or any one more remotely related.

A constitution of Anastasius gave emancipated consanguineous brothers and sisters rights of agnation with a deduction of one half in favour of agnates. Justinian abolished the deduction and extended the rights of agnation to children of brothers and sisters and also to uterine brothers and sisters and their children. He also put agnate succession of females on the same footing as that of males. It had previously been restricted to consanguineous sisters.

For Justinian's settlement of the law of intestate succession by Novels 118 and 127, see 328.

The right to succeed in these cases was enforced by the Interdict **Quorum Bonorum**, or in the later procedure by the action which took its place, viz., **hereditatis petitio utilis**.

**330.** *What was bonorum possessio? What two kinds of bonorum possessio were there when the deceased had made a will?*

**Bonorum possessio** was the right to the succession of a deceased person conferred and protected by the Prætor, who gave the possession of the property of the deceased to the person whom he regarded as equitably entitled to it. At first the Prætor simply intervened to put the legal *heres* in possession of the inheritance in case of dispute (*iuris civilis adiuvandi gratia*). Subsequently he used this power to grant the possession to certain relations whom the old law passed over (*iuris civilis supplendi gratia*), and even to set aside the legal heir in favour of other persons who, according to the views current at the time, had a prior equitable claim (*iuris civilis corrigendi gratia*).

**Bonorum possessio secundum tabulas**, granted to the heir under a valid will, or to the heir under a will defective in law through some flaw in the execution thereof (*e.g.*, the omission of the formal *mancipatio*), or the subsequent occurrence of some event rendering it invalid, as where the deceased had suffered a *capitis deminutio* after the making of the will and had subsequently been *restitutus in integrum*.

**Bonorum possessio contra tabulas** granted in opposition to the will, as in the case of the passing over of an emancipated son, or where a freedman had not bequeathed a proper share of his property to his patron.

**331.** *What were the provisions of the Sc. Tertullianum and the Sc. Orphitianum?*

**Sc. Tertullianum** (*temp.* Antoninus Pius) conferred on the mother the right of succession to her intestate children (provided she had the *ius liberorum*, *i.e.*, had three children, if a free-born woman, or four, if a freedwoman). She was excluded by children or the father or an agnatic brother of the deceased, and succeeded concurrently with an agnatic sister; but was to be preferred to more remote agnates.

The disability of a mother not having the *ius liberorum* was partially removed by legislation of Constantine and Theodosius and Valentinian, and was abolished by Justinian.

**Sc. Orphitianum** (*temp.* Marcus Aurelius) conferred on the children, as such, a first right of succession to their intestate mother.

**332.** *What claims (if any) had (a) the widow, (b) the mother, at different periods of Roman Law, against the estates of her husband and of her children respectively dying intestate?*

(a) When the wife came under her husband's *manus*, she succeeded, on his death intestate, as one of the *sui heredes*, having the same legal rights as a *filiæfamilias*. On the disappearance of *manus*, and, while it still existed, in the case of women who did not come under their husband's *manus*, the widow was only entitled, under the Prætor's Edict, to *bonorum possessio* on failure of cognate relations (**unde vir et uxor**). This was retained by Justinian, but by Novel 117 he provided that if the widow was poor and without *dos* she should be entitled to a fourth of the inheritance, or, if she had more than three children, to a *virilis portio*.

(b) In early Roman Law, the mother could only succeed to her children as an agnate (*i.e.*, when she was in the *manus* of the father and so a quasi-sister of her children). When she was not in *manu* she had no right of succession. The Prætor allowed her to succeed as a cognate in default of agnate relations, and by the **Sc. Tertullianum** (*circa* A.D. 158) she was to be preferred to *agnati* (other than brothers and sisters) in the succession if she had the **ius liberorum**. Brothers excluded her, and, in the case of sisters, she shared equally with them. Subsequently some minor changes were made by imperial legislation in the mother's position, and the requirement of the *ius liberorum* was entirely dispensed with by Justinian. Finally, by Novels 118 and 127, Justinian remodelled the law of

intestate succession. Under these enactments the mother succeeded equally with the father in default of descendants, but if there were brothers or sisters of the whole blood, she and the father shared equally with them *per capita*.

**333.** (a) *What, at different periods of Roman legal history, was the position of a widow as regards the intestate succession to her deceased husband?* (b) *What rights had the widow, on the death of her husband, in respect of her dos?*

(a) In early Roman Law, the wife had no rights of succession to her husband unless she was in the *manus* of her husband at his death, in which case she would have succeeded to him as one of his *sui heredes*. The Prætor's Edict gave the husband and wife reciprocal rights of succession on failure of cognate relations (or, in case of a *libertinus* or *libertina*, on failure of the patron or patroness and their direct descendants)—**unde vir et uxor**—and this was retained by Justinian.

(b) The widow was entitled to the return of the *dos* (unless provided by her *paterfamilias* or a third person with an express agreement for return to him on termination of the marriage) and could enforce her rights by an **actio rei uxoriæ**, or, if a stipulation had been entered into by the husband, by an *actio ex stipulatu*. The former was *bonæ fidei*, it did not pass to the heirs, and the husband was allowed to make certain deductions and was allowed time to restore *res fungibiles*: the latter was *stricti iuris* and was governed by the strict terms of the contract. Justinian replaced the *actio rei uxoriæ* by an action on an implied stipulation, under which the husband was allowed to retain necessary expenses and was given a year for return of movables. He had, however, to return immovables at once. Justinian also gave the wife an **implied hypothec** over the husband's property to secure the return of the *dos*.

**334.** "There were," says Justinian, "other kinds of universal succession in existence prior to that last mentioned

(i.e., prior to *addictio bonorum libertatis causa*), for example, the 'purchase of goods,' which was introduced in the case of insolvent debtors."

- (a) Explain clearly the meaning of the phrase "universal succession."
- (b) What was the nature of *addictio bonorum libertatis causa* as first employed?
- (c) Give a general account of the proceedings connected with the "purchase of goods" referred to; and name some of the "acts of bankruptcy" which would justify these proceedings.
- (d) How was the property of insolvent debtors dealt with in Justinian's time?
- (a) See 267.

(b) **Addictio bonorum libertatis causa** was introduced by a rescript of Marcus Aurelius, which provided that where there had been a gift of freedom to slaves in a will and the heirs nominated therein declined or omitted to enter, one of the slaves might have the inheritance adjudged to him on giving security for the payment of the creditors in full, and that thereupon the gifts of freedom should take effect. The Emperor Gordian subsequently allowed *addictio* to be made to any one who would give security for the payment of creditors.

- (c) and (d) See 335.

**335.** (a) Describe *Bonorum Emptio* as a mode of dealing with insolvent debtors. What is meant by the statement that *Bonorum Emptio* was a *Prætorian* mode of universal succession? Give an account of the later method of dealing with insolvent debtors.

(b) How were insolvent debtors dealt with at different periods of Roman legal history?

(c) Give an account of *Emptio Bonorum* and of *Cessio Bonorum* as modes of dealing with insolvent debtors. What was the *Beneficium Quinquennialium*?

In early Roman Law, the only method of enforcing the claims of creditors against insolvent debtors was by seizing the debtor's person and reducing him to bondage (**manus iniectio**). The procedure was regulated by the XII. Tables and considerably mitigated by the *Lex Poetelia* (326 B.C.).

Direct execution against the property was introduced through the Prætor's Edict in the form of **Bonorum Emptio**. A *missio in possessionem* was granted, empowering a creditor or several creditors to take possession of the entire estate of the debtor. This was for the purpose of protecting the property. It continued for thirty days, if the debtor was living, or fifteen days, if he was dead. During that period the sale was advertised in this form: "A., our debtor is insolvent; we, the creditors, are selling his property; let any purchaser appear." The creditors who had not taken part in the proceeding thus received notice. After the prescribed period had elapsed, one of the creditors was chosen by the rest as *nagister*; and after the lapse of another period the conditions of sale were published; and after a third interval, the *nagister* awarded the goods to the party who promised the creditors the highest dividend. The effect of this sale was that the purchaser (*bonorum emptor*) became entitled to all the debtor's property and liable for such a percentage of the debts as he had promised to pay. He did not acquire quiritarian ownership of the goods sold but held them *in bonis*. He sued and was sued by Prætorian actions. This is what is meant by saying that *Bonorum Possessio* was a Prætorian mode of universal succession.

**Cessio Bonorum** was introduced by a *lex Iulia* (enacted under either Julius Cæsar or Augustus) which allowed insolvent debtors to make a voluntary surrender of their property to their creditors. By doing so they escaped liability to personal execution and did not incur *infamia*. They were allowed to retain so much of their after-acquired property as was necessary for their maintenance (**beneficium**

**competentia**). But no debtor could claim the privilege whose bankruptcy was due to his *culpa*.

**Later procedure.** Under the system of *bonorum emptio*, the *magister* was the agent of the particular creditors who had elected him; he was not a public officer entrusted with the administration of the bankrupt's estate. It was superseded in later times by the practice of entrusting the management of the debtor's property to a *curator bonorum* appointed by the creditors with the sanction of a magistrate. The duty of the *curator* was to realise the estate in separate lots (**distractio bonorum**) and pay the creditors *pro rata* out of the proceeds. Under this system the bankrupt was not dispossessed of his whole property and he consequently escaped *infamia*. The creditors were paid, not by the *bonorum emptor*, but by the debtor himself (through the medium of the *curator*) and if there was any surplus he got the benefit of it. This procedure was at first only employed in favour of senators in embarrassed circumstances, but subsequently its use became general.

**Beneficium quinquennialium.** A debtor might petition the Emperor that his creditors should be put to their election to give a respite of five years for payment of their claims or accept a *cessio bonorum*. If the petition was granted, the choice was determined by the creditors having a majority in value: if the amount owing to the opposing parties were equal, the majority in number decided the choice.

**336.** *What was the nature of Cessio Bonorum in the case of an insolvent? What was its effect? To whom was it allowed?*

**Cessio bonorum** was in the nature of a composition with creditors. It was introduced by a *lex Julia* (ascribed to Julius Cæsar, but more probably enacted by Augustus). By surrendering his property to the creditors the debtor escaped liability to personal execution. It did not discharge

him from his debts, but he was allowed to retain so much of his after-acquired property as was necessary for his subsistence (**beneficium competentiæ**). He also escaped *infamia*.

It was only allowed to debtors who could show that their insolvency was not due to their own culpability; for instance, it was not allowed where the debts arose *ex delicto*.

## VI.—LAW RELATING TO ACTIONS.

SANDARS.—IV., Titles 6—16.

MOYLE.—Notes to IV., 6. 24, 28, 30, 33; 12; 13. 5 and 7; 15; 16. 1 and 2; Excursus X.

MUIRHEAD.—Sections 33—41 and 71—73.

POSTE.—Notes to IV., 30—38 and 138—170.

SOHM.—Book II., Ch. I.

**337.** *Describe in the most general manner the characteristics of the three systems of Roman procedure (legis actiones, formulary system, and extraordinaria iudicia), and give an account of the transitions from the earlier to the later of these systems with the reasons which led to them.*

The earliest system of civil procedure was that of the **legis actiones**—methods of process, having their origin in voluntary submission to arbitration, the formal proceedings in which, being prescribed by statute, had at an early period become fixed and immutable. The characteristic of the system was strict adherence to *form*. Any formal error was fatal to the suit. It was consequently inelastic and admitted of very little extension to meet the requirements of a progressive community.

It was superseded by the Formulary System, the distinctive feature of which was the commencement of the action, after summons and appearance, by embodying the plaintiff's claim in a written **formula**. This appears to have been introduced by the peregrin prætor in actions between peregrins, or between peregrins and citizens, and was gradually

adopted by the urban prætor in actions within his jurisdiction. The **Lex Aebutia** (circa B.C. 171) sanctioned the use of the formulary procedure in all actions except (a) those coming before the Centumviri, and (b) proceedings on the ground of threatened damage (*damnum infectum*); and the **Leges Iuliæ Iudiciariæ** (temp. Augustus) probably completed the change, by making the procedure by formula compulsory where it had previously been optional.

In certain cases the magistrate, both under the system of *legis actiones* and under the formulary system, took cognizance of the whole matter and heard and decided the dispute himself without reference to a **iudex**. Examples of this are afforded by *in integrum restitutio*, *missio in possessionem*, and litigation regarding *fideicommissa*. This was known as **cognitio extraordinaria**, as being outside the ordinary course (*ordo*) of judicial procedure: it was the application by the magistrate of administrative procedure in the sphere of litigation. On the establishment of the Empire, the *imperium* of the republican magistrates passed to the emperors and was exercised by functionaries to whom they delegated their powers. In matters within their jurisdiction they were directed to adopt administrative methods of procedure as being more speedy and efficacious, and this led to a great extension of the extraordinary procedure and the gradual supersession of the older methods. The change was effected first in the Provinces and was gradually extended to Rome. The prætors had become imperial officials and naturally aided the development of the new system at the expense of the older procedure. The excessive technicality which had been developed in the formulary system of pleading tended to its disuse and the new system of appeal also contributed to the change. By the end of the third century A.D. the procedure by formula had quite disappeared and the constitution of Diocletian of A.D. 294 assumes it to be obsolete.

**338.** *What different views are held as to what was really enacted by the laws to which Gaius attributes the abolition of the legis actiones?*

The opinion of most recent writers on the subject is that the **Lex Aebutia** merely authorised the Prætor Urbanus to direct the trial by *formula* (which had been the usual procedure in actions coming within the jurisdiction of the Prætor Peregrinus) of any action between Roman citizens which required the appointment of a *iudex*, the parties having the option between this procedure and the *legis actio*. According to this view, the **leges Iuliæ** abolished the *legis actiones*, which had practically gone quite out of use, except in Centumviral actions, by enacting that the formulary process should be compulsory wherever it had previously been optional.

According to Sohm (pp. 259 *et seq.*), the object of the *Lex Aebutia* was to give statutory validity to procedure by *formula* and to give to the judgment of the *iudex* on the issue as framed in a formula the effect of a judgment founded on statute. In his view, the *formula* had already been introduced by the *Prætor Urbanus* in his court and came into conflict (as far as the City Court was concerned) with the procedure by *legis actio* which was in the control of the *Pontifices*. The effect of the *Lex Aebutia* was to declare the *formula* a *modus agendi* of the *ius civile*.

Cuq suggests that the *Lex Aebutia* permitted the *Prætor Urbanus* to direct the trial by *formula* only of *condictiones*, the object being to save the plaintiff in actions of debt from the inconvenience of waiting the thirty days which the **Lex Silia** interposed between the proceedings *in iure* and the appointment of the *iudex*.

**339.** *Explain the procedure by which, at different periods of Roman Law, a defendant to an action was brought before the Prætor.*

Under the early law it was left to the plaintiff to bring the defendant before the magistrate. The summons (*in ius*

**vocatio**) was the private act of the plaintiff and disobedience to it was not a legal offence. The XII. Tables went no further than to authorise the employment of force to seize and drag an unwilling defendant before the court. Under the Edictal procedure the summons was still the act of the plaintiff, but disobedience was constituted a wrong giving rise to a penal action and also exposing the property of the defendant, if he kept out of the way, to seizure and sale. The principle was established that it was the duty of a citizen to answer in the courts of justice any complaint brought against him. Under the Imperial system (**extra-ordinaria iudicia**) the summons was issued by the officers of the court. The plaintiff applied to the magistrate and furnished a short statement of his case (**libellus conventionis**). This was sent by an officer of the court to the defendant who could be arrested if he refused to give an undertaking to appear.

**340.** *Describe the functions of the Prætor in a case of civil litigation in the time of Gaius, from the stage of summons to that of execution.*

The plaintiff summoned the defendant to appear before the Prætor (**in ius vocatio**). On his appearance the plaintiff indicated the **formula** which applied to his case and the defendant applied to insert an exception, when necessary. The Prætor, after hearing the allegations of the parties settled the *formula*.

The issue being settled the **iudex** was selected and the result of the preliminary pleadings was embodied in a *formula*, security being taken from the defendant to appear and abide by the decision. After the *condemnatio* the creditor could apply to the Prætor to grant him execution.

**341.** *What was the nature of the procedure extra ordinem? Sketch the course of proceedings under this system.*

In the procedure **extra ordinem** the magistrate himself dealt with the cause throughout and there was no reference to a *iudex*.

The proceedings were modified and improved from time to time [*e.g.*, by Constantine, and subsequently by Theodosius II.] but in the time of Justinian they were as follows:—

A written summons setting out the nature of the plaintiff's demand (**libellus conventionis** or **citationis**) was issued and served by an officer of the court (*executor* or *viator litium*) on the defendant and he was required to give security for his appearance (**cautio iudicio sistendi**). On the appearance of the defendant the pleadings took place; the plaintiff and defendant stated their respective contentions, which were taken down by an officer of the court, and the issues were settled, that is, the exact nature of the dispute between them was ascertained. A day was then fixed for the hearing at which the parties produced their proofs and respectively addressed the court. The judgment was required to be written and publicly read and after signature by the judge was enrolled among the court records.

**342.** Describe the *Actio Sacramento*, and distinguish it from the *legis actio* called *Condictio*. What inferences have been drawn from these actions as to the character of primitive judicial procedure?

For a description of the **Actio Sacramento**, see Gaius IV. 16 and 17.

In the **Condictio**, the plaintiff gave notice to the defendant to appear before the Prætor on the 30th day after the summons to choose a *iudex*. The parties then entered into a wager whereby a third of the sum in dispute was forfeited to the successful party (instead of going to the State as in the *Sacramentum*), in addition to the subject-matter of the dispute. The reason for the introduction of the *Condictio* was a matter of difficulty to Gaius and has given rise to much conjecture since. Actions commenced by *sacramentum* went before the Centumviral Court; and, possibly, the introduction of the *condictio* was to enable the parties to

refer their dispute to a *iudex* chosen by themselves. Its introduction may also be connected with the abolition of the summary procedure of *manus iniectio* in the case of *nexum* by the **Lex Poetilia** [about 326 B.C.] [see Muirhead sec. 40].

The **Condictio**, therefore, differed from the **Actio Sacramenti** in the following respects :—

- I. The wager was forfeited to the successful party <sup>(who was the winner)</sup>.
- II. The case was tried before a single *iudex*.
- III. The procedure *in ius* was different.

IV. The *Actio Sacramento* was applicable to both real and personal claims ; the *Condictio* only to claims *in personam*.

These actions have been considered by some writers to lead to the inference that early legal procedure originates in a voluntary submission to arbitration [see Maine, p. 376].

A conjecture which is now very generally accepted regarding the origin of the *Sacramentum*, and perhaps of judicial procedure generally, is that it was an appeal to religion, incidentally leading to an inquiry into the merits of the respective claims of the parties [see 343, and Girard, p. 977].

**343.** Trace the steps by which procedure by *Sacramentum* became obsolete. What inferences does its name suggest as to the early character of this mode of trial?

The **Legis actio sacramento**, which originally was general in its scope and applicable to both real and personal claims, was to a great extent superseded in personal actions, even during the period of *legis actiones*, by other forms of procedure, viz., the **actio per iudicis postulationem** and the **condictio**. With the general introduction of the formulary system by the *Lex Aebutia* and *Leges Iulie* it became restricted to actions before the *Centumviral Court*, viz., actions relating to Quiritary rights in the strict sense (*status*, inheritance, quiritary ownership, *servitudes*, etc.).

Even in claims of ownership and inheritance an alternative procedure by *formula* was established through the expedient of a nominal wager (**per sponsionem**), the *sponsio* in this case being merely to give jurisdiction (**præiudicialis**), and not penal.

A direct action by formula, without the intervention of a *sponsio*, the **formula petitoria**, had also been introduced, before or about the time of Cicero, for the recovery of property; and by the time of Gaius had been extended to the recovery of an inheritance. This must have tended to the disuse of the sacramental procedure in the majority of cases to which it was still applicable. The great changes effected in the law of property and inheritance by the Prætor's Edict and Imperial legislation also greatly narrowed the area of its possible employment. It nevertheless continued in use in some cases throughout the classical period of Roman Law and even as late as Diocletian. It disappeared with the general introduction of the extraordinary procedure.

The **Sacramentum** in its origin was probably an appeal to religion. Each party took an oath as to the justice of his case and this necessitated the decision by the king, as the supreme authority in religious as well as civil matters, as to which party was in the right in order to ascertain which must make expiation for his perjury.

**344.** Give two examples of a Fictitious Action. What was the *Actio Pauliana*?

Examples of **Fictitious Actions** occur in the actions, introduced by the Prætor, against aliens on the fiction that they were Roman citizens, and actions against persons who had undergone *capitis deminutio* on the fiction that no *capitis deminutio* had taken place. [see Gaius IV. 37 and 38]. For other examples, see **345**.

The **Actio Pauliana** was an action *in rem* which could be brought by creditors for the recovery of property which

the debtor had alienated in fraud of them. The precise nature of the action has been a matter of much dispute, but it appears to have been based on a fiction that no alienation and delivery of the property had taken place [J. IV. 6. 6].

There was also an *actio Pauliana in personam* which could be brought to enforce the obligation to restore property fraudulently conveyed or any gain made through fraudulent transactions with the debtor which diminished the debtor's estate. This action did not involve a fiction.

**345.** *What was the nature of the Fictions employed in the following actions: Actio Rutiliana, Actio Serviana, Actio Publiciana.*

**Actio Rutiliana**—available to the purchaser of an insolvent's estate. The fiction was that such purchaser was *procurator* of the insolvent.

The claim in the *intentio* was in the name of the insolvent and the name of the real plaintiff (the purchaser) was inserted in the *condemnatio*.

**Actio Serviana**—also available to the purchaser of an insolvent's estate. Such purchaser was enabled to sue under a fictitious allegation that he was the heir of the insolvent.

**Actio Publiciana**—by which a person who had lost possession of property to which he had an equitable title but not the quiritary title, owing to the omission of the forms of *mancipatio*, was allowed to sue on the fiction of a completed *usucapio*.

**346.** *What was the nature of the actio Publiciana, the actio Quasi-Serviana, and the actio de pecunia constituta? For what purposes were they severally established?*

**Actio Publiciana**—was a Prætorian action *in rem* based on the fiction that a title had been acquired to the subject-matter of the action by *usucapio*. It was introduced to

enable a person who had acquired possession of *res mancipi* in good faith and by some recognised legal title (*ex iusta causa*), but whose title was defective owing to the omission of the *mancipatio*, to recover the same from any one who had wrongfully ousted him before his quiritarian right had been perfected by *usucapio*.

**Actio Quasi-Serviana**—was an extension by analogy of the **actio Serviana** and was introduced to enable a person, to whom property had been hypothecated to secure a debt, to recover such property in default of payment of the debt.

**Actio de pecunia constituta**—An action given to enforce an informal promise to discharge an existing obligation on a day fixed. It was at first confined to promises respecting *res fungibiles*, was limited to one year, and only applied to an actually existing and vested, and not to a future or conditional, obligation. Justinian extended its scope to all obligations, whether regarding fungible things or not, existing or future, vested or conditional, and abolished the short time of prescription.

347. Give a short account of the Formulary system of procedure, and describe the various parts of the Formula.

**The Formulary system.** The proceeding by formula commenced by the *in ius vocatio*, i.e., a summons by the plaintiff to the defendant to appear before the Prætor or other magistrate having jurisdiction. The parties being before the magistrate, the plaintiff stated his case, indicated the particular formula of action which he wished to employ (**editio actionis**), and requested the magistrate to grant him an action (**postulatio actionis**). The defendant was not allowed at this stage to dispute the truth of the facts stated by the plaintiff, the only question being whether, assuming them to be true, an action would lie. He could only submit that the plaintiff's allegations did not furnish

any ground for an action. If the magistrate, after hearing the parties, decided, or if it was admitted, what the action would lie, the next step was to settle the *formula*.

This consisted of written instructions, drawn up by the magistrate, nominating a judge, setting forth the issues to be tried, and directing the judge to condemn or absolve the defendant according as he found such issues proved or not proved.

The formula being settled and delivered, the parties had to appear before the judge, who, after production of proofs and hearing the parties or their advocates, delivered his judgment (*sententia*).

After pronouncing judgment, the judge's duty came to an end. To obtain execution resort had again to be made to the magistrate.

The characteristic feature of this system was the employment of a written formula containing the terms of reference to the judge and defining the questions he had to decide and the powers conferred on him.

The **chief parts of a formula** were five—

I. **Nomination of the iudex**, e.g., *Titius iudex esto*.

II. **Demonstratio**, a clause containing a recital of the facts on which the action was based, e.g., *Quod Aulus Agerius Numerio Negidius hominem vendidit*. It was probably confined to actions in which the claim was unliquidated [*i.e.*, with an *intentio incerta*].

III. **Intentio**, the part of the formula in which the question to be investigated by the judge was stated, e.g., *Si paret Numerium Negidium Aulo Agerio sestertium decem millia dare oportere*.

IV. **Adiudicatio**, a clause only occurring in partition actions, in which the judge was directed to adjudicate the shares in the property to be partitioned, e.g., *Quantum adiudicari oportet iudex Aulo Agerio adiudicato*.

V. **Condemnatio**, the clause directing the judge to condemn or absolve the defendant according as he found the plaintiff's allegations proved or not, *e.g.*, *Iudex N. Negidium A. Agerio sestertium decem millia condemna, si non paret absolve.*

The formula might also contain other clauses, *e.g.*, a **Præscriptio**, or an **Exceptio** (see 353 and 355).

**348.** Explain, with illustrations, the differences between actions in rem and in personam, stricti iuris and bonæ fidei, directæ and utiles, in ius and in factum conceptæ.

An action **in rem** was one in which the plaintiff claimed the ownership of a thing or some right available against persons generally, the defendant not being named in the *intentio* of the formula, *e.g.*, "*Si paret fundum Capenatem ex iure Quiritium Auli Agerii esse.*"

An action **in personam** was one in which the plaintiff asserted an obligation on the part of the defendant to transfer, perform, or make good something to or for him (*dare, facere, præstare oportere*).

The *condictio certi* (in which a definite sum of money was claimed) may serve as an illustration. The *intentio* was "*Si paret Numerium Negidium Aulo Agerio decem millia sestertium dare oportere.*"

Actions **stricti iuris** were actions in which the judge was bound to give judgment in accordance with the strict legal effect of the transaction on which the claim was made and could not take notice of equitable considerations unless they were specially pleaded, *e.g.*, the *condictio certi*.

**Bonæ fidei** actions were those in which the judge, in giving his decision, was allowed to give full effect to conflicting equitable claims arising out of the transaction which was the subject of the suit. The term originated from the words *ex fide bona* or some equivalent expression (*e.g.*, *quod æquius* or *quod melius*) appearing in the *intentio*. Examples of such actions are those arising out of the consensual contracts, the *actio empti*, etc.

Actions **directæ** and **utiles**. See 349.

Actions **in ius conceptæ** were those in which the formula contained an allegation of a legal duty expressed by the word *oportere*, e.g., "*Quidquid ob eam rem N.N. A.I. dare facere oportere.*"

Actions **in factum conceptæ** were those in which the formula was framed on an allegation of fact, e.g., "*Si paret A.A. apud N.N. mensam argenteam deposuisse eamque dolo malo N. N. A. A. redditam non esse,*" the judge being directed to condemn or absolve the defendant according as he found the fact proved or not.

**349.** Explain the meaning of the following as applied to actions: *directa, contraria, utilis, bonæ fidei, præiudicialis, arbitraria, confessoria, negatoria.*

**Directa**, as opposed to **contraria**, was applied to the action available to the party having the principal interest to be protected in a transaction *bonæ fidei* and bilateral, e.g., the action against a tutor by a *pupillus* or the action against a *commodatarius* by the *commodator*.

**Directa**, as opposed to **utilis**, was applied to an action arising immediately from some rule of law or formulated on the express words of some statute, as opposed to equitable extensions of such action to cases not within its original scope.

**Contraria** was applied to the action available to the party having the subordinate interest in a *bonæ fidei* and bilateral transaction, e.g., the action available to the *tutor* to be reimbursed his legitimate expenditure.

**Utilis** was applied to an equitable extension of an action to cases not within its original scope. *Utiles actiones* were either (a) *fictitiæ*, e.g., the *actio Publiciana*, or (b) *in factum*, e.g., equitable actions under the *lex Aquilia*.

**Bonæ fidei** actions were actions in which the judge was authorised to take equitable considerations into account in making his award without their being expressly raised in

the *formula* (or the pleadings, in the later system of procedure). Thus, he took cognisance of fraud or of a set-off without their being specially pleaded; he allowed interest although not expressly claimed.

**Præiudicialis actio** was an action brought to ascertain facts preliminary to further proceedings, *e.g.*, to ascertain status, the amount of a *dos*, whether the provisions of a statute had been complied with, the value of property, etc.

**Arbitraria** was applied to an action in which considerable latitude was allowed to the judge in fixing the amount of the *condemnatio* with the object of practically enforcing specific restitution of property. Actions in rem were of this kind and also some personal actions of a restitutory or exhibitory character, *e.g.*, the actions *ad exhibendum*, *finium regundorum*, *quod metus causa*, and *de dolo*. They all contained a clause *nisi* (*e.g.*, *nisi restituat*). The judge made an order that a thing should be restored or produced, and if the order was not obeyed the defendant was condemned to pay compensation fixed after taking all the circumstances into account.

**Confessoria**, applied to an action *in rem* brought to affirm a right to a servitude and for damages for its invasion.

**Negatoria**, applied to an action in which the owner asserted the freedom of his property from a servitude claimed by the defendant; its object being restoration of possession (if the defendant claimed use or usufruct) or cessation of the acts by which his rights of ownership had been interfered with and damages arising therefrom.

**350.** What do you understand by *bonæ fidei* actions, and when are they first found in Roman procedure?

Compare them, in respect of *formula*, with *prætorian* actions *in factum*.

**Bonæ fidei** actions were personal actions in which the judge had power to take notice of equitable considerations

in giving his decision without the insertion of an express direction in the formula to that effect, as opposed to actions *stricti iuris*, in which the judge had no such discretion. Thus, in actions *bonæ fidei*, he took notice of *dolus* without the insertion of an express *exceptio doli*; he had regard to customs and usages; he took cognisance of set-off without its being specially pleaded; he allowed interest from the time of default.

Their first appearance in Roman procedure probably dates from the introduction of the *actio fiduciæ* [see Sohm, pp. 62—65].

**Prætorian actions in factum** were not classed as *bonæ fidei*, which term was only applied to actions in *ius conceptæ*, but they were practically similar in effect, as the prætor directed the judge to condemn the defendant if the facts were found as he thought proper to state them. The formula in a *bonæ fidei* action opened with a *demonstratio*, and the *intentio* (in *ius conceptæ*) ran “*Quidquid paret ob eam rem Numerium Negidium Aulo Agerio dare facere oportere ex bona fide*,” while in an *actio in factum* there was no *demonstratio*, and the *intentio* made the decision of the judge dependent on a question of fact, e.g., “*Si paret A. Agerium apud N. Negidium mensam argenteam deposuisse eamque dolo malo N. Negidii A. Agerio redditam non esse*.”

**351.** Explain and illustrate the importance of (a) *actiones utiles*, and (b) *actiones in factum conceptæ*.

(a) **Actiones utiles** were opposed to *actiones directæ* and were actions in which the Prætor modified the formula of an existing action in order to afford a remedy in cases not within the scope of the original action. An important class of such actions was the fictitious actions, in which the modification of the formula consisted in the insertion of a fictitious allegation, the *iudex* being instructed to give his decision on the assumption of the truth of such fictitious allegation, e.g., the **actio Publiciana**. An *actio utilis* was

always modelled on an *actio directa*. Where this was clear on the face of the formula, it was an **actio fletitia**; where the derivation was less patent it was an *actio utilis* pure and simple, e.g., in the case of the action given to the assignee of a debt, or to the complainant in a case coming under the *lex Aquilia*, where the injury was not done *corpore*.

(b) An **actio in factum** was one in which the *intentio* set out for decision by the *iudex* merely a question of fact, and was the instrument by which the Prætor was enabled to create new rights independent of the *ius civile*. By drawing up the formula so that the decision depended on the finding of the *iudex* as to certain facts, the Prætor's power of developing the law became in theory unlimited. It was, however, restrained in practice by deference to professional opinion.

**352.** *What, in the Formulary Procedure, was Litis Contestatio? What were its legal effects?*

**Litis contestatio** in the Formulary Procedure was the stage in the proceedings at which the action passed from the Prætor to the *iudex*, the conclusion of the proceedings *in iure*, the issues being defined and set forth in the *formula*.

Its **effects** were—

I. It prevented the plaintiff successfully bringing another action in respect of the same subject-matter. In the case of *iudicia legitima* it operated as a novation of the right of action.

II. It gave rise to an obligation, binding on the parties, to abide by the result of the judgment.

III. It interrupted the period of limitation of the right of action.

IV. It fixed the amount of the *condemnatio*, as the judgment was supposed to follow immediately.

V. It made the subject-matter of the suit a *res litigiosa* and therefore inalienable pending the action.

**353.** Explain the nature and importance of the *Exceptio* in the Formulary system of pleading. Mention some of the most important *Exceptiones*.

An **exceptio** was a plea allowed to a defendant, who, though liable according to the letter of the law, yet alleged facts which would make his condemnation inequitable. The essence of the *exceptio* was in the expression it gave to the opposition between the prætorian and the ancient *ius civile*. It was the means by which the magistrate gave effect to equitable defences not recognised by the *ius civile*. Thus, the plaintiff's claim might be based on a formal contract induced by fraud or intimidation. In strict law the defendant was liable, but the Prætor allowed the fraud or intimidation to be set up by way of exception to the claim and directed the judge to condemn only in the event of the exception not being established by the evidence.

Some of the **most important exceptiones** were (a) *doli*, (b) *metus*, (c) *non numeratæ pecuniæ*, (d) *pacti conventi*, (e) *rei iudicatæ*, (f) *rei in iudicium deductæ*, (g) *longi temporis*, (h) *litis dividuæ*, (i) *Sc. Macedoniani*, (k) *Sc. Velleiani*, (l) *legis Cincię*, etc. [see Sohm, pp. 290—297].

**354.** What was the formula of an action? What advantages had the procedure with formula over the earlier procedure? Explain the construction of an ordinary formula by the example of an action on the contract of sale.

How far was the formulary procedure a complete novelty and how far a reproduction of the system of *legis actiones*?

The **formula** consisted of written instructions issued by the Prætor or other magistrate to a judge or several judges (*recuperatores*) containing (1) the appointment of the judge or judges, (2) a statement of the questions to be

decided, and (3) a direction to condemn or acquit according to his or their finding on the issues submitted.

The procedure by formula had two great **advantages** over the earlier procedure,

(1) The parties had no formal acts to perform or formal words to utter in the proceedings in iure.

In the *legis actio* procedure an error of form at any stage of the proceedings was fatal. In the formular system no litigant could commit a fatal error before the *litis contestatio*.

(2) The *formula* was infinitely more elastic and could be adapted so as to give effect to any claim which the Prætor considered equitable. The earlier procedure was strictly limited by the terms of the statute on which the action was founded and admitted of little or no extension to meet new circumstances.

Construction of formula—see 347.

Formula in action on contract of sale—*Titius index esto : [Demonstratio] Quod Aulus Agerius Numerio Negidio hominem vendidit: [Intentio] Quidquid paret ob eam rem N. Negidium A. Agerio dare facere oportere ex bona fide: [Condemnatio] Eius, index, N. Negidium A. Agerio condemnna, si non paret absolve.*

The novelty in the formular system was not the division of the proceedings into two stages, the proceedings *in iure* before the magistrate, and those *in iudicio* before the judge, for this had already been in practice in the earlier procedure. The important change was in dispensing with the solemn formal proceedings and the strict adherence to the statutory words in the ***litis contestatio***, and allowing the question at issue to be embodied in a written formula under the supervision of the Prætor. The Prætor, whose functions in actions under the earlier system had been merely ministerial, thus obtained control of litigation, as the decision whether a formula could be properly granted to an applicant rested with him.

**355.** What were **Præscriptio** and **Exceptio** as parts of a Formula? Give an example of each.

**Præscriptio** was a clause, inserted at the commencement of the formula, limiting the scope of the inquiry on behalf of the plaintiff (**p. pro actore**) or setting out some condition, subject to which the inquiry was to proceed, on behalf of the defendant (**p. pro reo**). In the time of Gaius the *præscriptio* on behalf of the defendant (e.g., *præscriptio longi temporis*) had ceased to be used, its place being taken by an *exceptio*. Examples of the **Præscriptio pro actore** were: "**Ea res agatur cuius rei dies fuit**," limiting the inquiry to money already due, so as not to prejudice future claims; and "**Ea res agatur de fundo mancipando**," limiting the inquiry to a claim on a mancipation so as not to prevent a claim being afterwards asserted on some other title.

**Exceptio** was a clause of the formula in which the defendant set out some equitable defence countervailing the plaintiff's claim. It usually took the form of a negative condition following the *intentio*, e.g., the *exceptio doli*—"Si in ea re nihil dolo malo Auli Agerii factum sit neque fiat."

**356.** Describe the original **præscriptio**, explaining the meaning of its name, and the application of the form **cuius rei dies fuit**.

**Præscriptio** (*Præ scribere*=to write before), in its origin, was a clause inserted at the commencement of the formula in an action, limiting the scope of the claim contained in the *intentio*, or setting out matters of fact forming the grounds of the action or constituting conditions on which the action might be maintained. [These latter, in later times, were inserted by way of *exceptio*.] It might be inserted in the interests of the plaintiff (*pro actore*) or on behalf of the defendant (*pro reo*).

An example of *præscriptio pro actore* was the clause "**Ea res agatur cuius rei dies fuit**"—by which the plaintiff

reserved his rights of action on debts not yet due, which would have been lost by *consumptio actionis* if the formula had not been thus modified.

**357.** *Illustrate the nature of an Exception by reference either to the **exceptio senatusconsulti Macedoniani** or to the **exceptio legis Anastasianæ**. In what part of the Formula, if at all, did an Exception appear? What was the difference between a dilatory and a peremptory Exception?*

The **exceptio Sc. Macedoniani** raised the defence that the debt sued on arose from a loan to a *filiusfamilias*, the Sc. having prohibited such loans (except under certain conditions).

The **exceptio legis Anastasianæ** raised the defence that a plaintiff who was assignee of a debt was claiming more than he had paid for the debt. By the **lex Anastasiana** it was enacted that a person who bought a debt should not be allowed to recover more than he had paid, together with lawful interest.

The *Exceptio* followed the *Intentio* in the formula and consisted of a negative clause involving an allegation which, if proved by the defendant (the burden of proof of an exception being on the defendant—**reus in exceptione actor est**) defeated the claim altogether or in part. In the above cases it would be in this form: "*Si in ea re nihil contra Sc. Macedonianum [legem Anastasianam] factum sit neque fiat.*"

**Dilatory and Peremptory Exception.**—A *dilatory* or *temporary* exception was one which raised the objection that the action was brought prematurely, e.g., an *exceptio pacti conventi*, where the plaintiff had agreed not to sue for a fixed time. A peremptory or perpetual exception was one which was absolutely destructive of the plaintiff's claim on the merits, e.g., the *exceptio doli*. Both were equally fatal to the plaintiff under the old law; for the dilatory exception, if established, led to judgment for the defendant, which would enable him to plead the *exceptio rei iudicatae* if the

plaintiff brought a second action. After the time of Zeno, however, the plaintiff would not lose his right of action, but he was not allowed to bring a second action until the expiration of twice the time during which he ought to have waited and until he had paid the costs of the first action (see 362).

**358.** *What was the origin of the Exceptio Doli? Explain and illustrate some of its principal applications.*

The **exceptio doli** was introduced by Aquilius Gallus (65 B.C.), the colleague of Cicero in the prætorship. It was in this form—" *si in ea re nihil dolo malo Auli Agerii factum sit neque fiat*" [Gaius IV. 119]. It extended not only to specific fraud or unfair dealing in the transaction on which the action was brought but also to any circumstances, even subsequent thereto, which made the bringing of the action inconsistent with good faith. It was thus of very wide application and covered the ground of many special exceptions as, for instance, the *exceptio metus, pacti conventi*, etc. It could also be used to give effect to a set-off or a counter-claim, e.g., when the defendant was called upon to deliver up some object, but claimed compensation for moneys expended on it.

Its insertion in the formula empowered the judge to take into account any circumstances which would make a condemnation of the defendant substantially unjust. As a result the *exceptio doli* came to be available in place of all special exceptions, operating as a plea of the general issue and enabling the defendant to set up any fact which, for any reason whatsoever, might seem calculated to secure his acquittal. [See Sohm, pp. 294—6.]

**359.** *To what extent, and by what means, was Compensatio on the defendant's side allowed to be set up against the plaintiff's claim?*

In actions *bonæ fidei* the judge was always allowed to give effect to a set-off arising out of the same transaction

(*ex eadem causa*). In *stricti iuris* actions a set-off could not be entertained, except by special favour, until a rescript of Marcus Aurelius allowed it to be raised in all cases when an *exceptio doli* had been expressly inserted in the formula. In these cases, the actions *stricti iuris* being on unilateral obligations, the set-off would necessarily arise from other transactions (*ex dispari causa*). In Justinian's time *compensatio* could be set up in any action, real or personal, except in the *actio depositi*. The claim set off, however, must be liquidated, or at any rate capable of being estimated with certainty (Cod. 4. 31. 14. 1).

**360.** What was the *condemnatio* clause in a formula? Give illustrations of it in an *actio in rem* and an *actio certæ creditæ pecuniæ*.

Distinguish between a *condemnatio incerta infinita* and a *condemnatio incerta cum taxatione*.

The **Condemnatio** was the clause in which the judge was directed to condemn or absolve the defendant according as he found the plaintiff's allegations proved or not. In the formularly procedure the *condemnatio* was always to pay a sum of money. Where the judge's discretion was unfettered, as in real actions, it was termed *condemnatio incerta infinita*. Where a limit was fixed which the judge could not exceed, as, e.g., in the *actio de peculio*, it was said to be *condemnatio incerta cum taxatione*.

For illustrations of the *condemnatio* in an *actio in rem* and an *actio certæ creditæ pecuniæ*, see Gaius IV. 50 & 51.

**361.** Account for the *condemnatio* of a formula being pecuniary. Was it possible to enforce specific performance of a contract, and if so, how?

The probable explanation of the fact that the *condemnatio* was always to pay a sum of money is that, both in early and in classical Roman Law, execution could only be enforced against the defendant in respect of a money debt.

Specific performance could not be enforced directly but it could be secured indirectly by obtaining a *formula arbitraria*, under which the *iudex* was allowed a discretion as to the amount which the defendant might be condemned to pay in the event of his refusing to perform his contract.

**362.** *Describe the cases and the consequences where a plaintiff intendit plus, minus, aliud pro alio.*

**362a.** *Explain the different kinds of plus petitio, and the injurious consequences which might arise therefrom to a plaintiff, according to circumstances.*

**Plus-petitio** occurs when the plaintiff includes in his claim more than is due. This might take place in four ways—(1) **re**, in regard to the subject-matter, where a larger sum is claimed than is due or where the whole is claimed when the plaintiff is only entitled to part; (2) **tempore**, in respect of time, when a claim is made absolutely for that which is due only at some particular time or subject to some condition; (3) **loco**, in regard to place, where the plaintiff demands in one place what the defendant has promised to pay in another place; (4) **causa**, in respect of the ground of action, where the plaintiff by his claim excludes the defendant from an election which the defendant has under the obligation, for instance, where the promise is general and the claim specific, *e.g.*, where the defendant has promised Stichus or Eros and the plaintiff demands Eros, or the defendant has promised purple and the plaintiff claims Tyrian purple.

By the older law an excessive demand was fatal: the plaintiff lost his action. A constitution of **Zeno** provided for *plus petitio* in respect of time, directing that the plaintiff should not lose his action but should be precluded from proceeding with it for double the time he ought to have waited, and should not be allowed to proceed until he had paid the expenses occasioned by his premature demand. A constitution of Justinian provided for *plus petitio* in other

respects, enacting that plaintiff should pay to the defendant three times the costs occasioned by the excessive demand.

*Plus petitio* could only occur in case of actions *stricti iuris* with an *intentio certa*. In *bonæ fidei* actions and actions in which the claim was for an uncertain amount, and also actions *arbitrarie*, the claim was for whatever the defendant ought to convey, do, or make good (*quicquid paret dare facere præstare oportere*), and hence the plaintiff did not incur the danger of excessive claim. *Plus-petitio* was only fatal when occurring in the *intentio*. In the *demonstratio* and *condemnatio* the error was not material.

Where a plaintiff's claim was less than what was due it did not affect the particular action. But, according to the older law, he could not bring a fresh action during the same prætorship as he was liable to be met by the **exceptio litis dividuæ**. Zeno, however, dispensed with the necessity for a fresh action and authorised the judge to award the whole of what was due, even though the claim was only for a part.

Under the older law, a plaintiff who claimed the wrong thing lost his action but might bring a fresh action. The *exceptio rei indicatæ* could not be set up as the claim was different. In the time of Justinian, however, the claim could be amended and the plaintiff only incurred the risk of having to pay costs incurred through his mistake.

**363.** Show how the operation of *res indicata* differed according as the *iudicium* was *legitimum* or *imperio continens*, explaining the nature of these *iudicia*.

A **iudicium legitimum** was an action instituted (1) in or within a mile of Rome, (2) between parties who were all citizens, (3) before a single *iudex* who was also a citizen. It was immaterial whether the ground of action arose *ex lege* (from statute) or from the Prætor's Edict.

If the action was *in personam* with an *intentio in ius concepta*, the *litis contestatio* extinguished the obligation

altogether and no fresh action could be brought. If, however, the *iudicium* was *in rem* or if it had an *intentio in factum concepta*, a fresh action could be brought, but the plaintiff could be met by an *exceptio rei in iudicium deductæ* or an *exceptio rei indicatæ*.

A *iudicium imperio continens* was so called because dependent on the *imperium* of the magistrate and not authorised by the *ius civile*. It included (a) actions in which any of the litigants was a *peregrinus*, or (b) were carried on at a place more than a mile from Rome, or (c) before *recuperatores*, or before a *peregrinus* as sole *iudex*. In these actions, *litis contestatio* did not extinguish the plaintiff's right to bring a fresh action on the same grounds, but such fresh action might be defeated by the *exceptio rei in iudicium deductæ* or the *exceptio rei indicatæ* [see Gaius IV. 103—109].

**364.** State the general principles according to which a right of action did, or did not, pass to and against the respective successors on death of the original parties.

As a general rule, rights of action available to or against the deceased were available to or against the heir, as continuing the legal *persona* of the deceased.

But (1) actions grounded on some grievance or insult strictly personal to the deceased and not involving loss to his estate, e.g., the *actio iniuriarum* or the *querela inofficiosi testamenti*, did not pass to the heir.

(2) Penal actions were not available against the heir unless there was no other remedy, and then only to the extent to which the inheritance had been enriched by the wrong done, the liability to the penalty being regarded as personal to the deceased.

Even in these cases, if an action had been commenced by or against the deceased during his lifetime and had reached the stage of *litis contestatio*, it passed to or against the heir, the *litis contestatio* giving rise to a distinct obligation.

**365.** *Trace the history of the law relating to the Limitation of Actions?*

There was originally no period of limitation for actions; and this continued to be the case with regard to actions arising from the old *ius civile* down to the time of Constantine.

Prætorian and ædilician actions, however, were in many cases subject to a period of limitation, usually an *annis utilis*. This was so in all such actions as were penal or which operated in derogation of a statute or the old *ius civile*. The *actio furti* was an exception and was perpetual. Interdicts, so far as they were penal, were subject to the same period of limitation, and so were all *actiones populares*. Occasionally a period of limitation was fixed for some particular action by statute, e.g., one of five years in the case of the *querela inofficiosi testamenti*. Constantine enacted that all real actions not already subject to a period of limitation should be barred after forty years. This period was subsequently reduced to thirty years. Theodosius (A.D. 424) made all actions, not otherwise limited, subject to the thirty years limit, with a few exceptions. This period of limitation was continued by Justinian, a few actions being excepted and still remaining perpetual, e.g., actions in assertion of liberty, and actions on behalf of the *fiscus* to enforce payment of taxes.

**366.** *Show how it might happen that a plaintiff sometimes obtained judgment only for a part of what was really due to him. Can you perceive any traces in English law of ideas similar to those upon which this peculiarity was founded?*

This might occur (1) from the nature of the action, e.g., in the *actio de peculio* the award was limited to the *peculium*; (2) in consequence of a set-off (*compensatio*); (3) where the defendant was allowed the **beneficium competentis.**

- (1) A parallel to the limitation of the judgment in the *actio de peculio* is found in English Law in the limitation of a judgment against a married woman to her *separate property*.  
 (2) A limited right of set-off was allowed by the English

Common Law and was considerably extended by statute. The rules under the Judicature Acts now allow any set-off or counterclaim to be raised in an action. (3) Traces of ideas similar to those giving rise to the **beneficium competentie** are to be found in the English law of bankruptcy, which reserves certain property to the bankrupt and allows him to retain any earnings reasonably sufficient to support himself and family; and also in the English law of execution and distress, which exempts certain property of the debtor from seizure.

**367.** *To what extent and by what actions could (a) fathers, (b) masters, (c) employers, be made responsible in Roman Law for the contracts of their sons, slaves, and employees respectively?*

(a) and (b). Under the *ius civile* a *paterfamilias* could benefit by, but not be made liable on the contract of his sons or slaves. The Prætor, however, introduced certain actions by which contracts made by sons under power or slaves might be enforced against the *paterfamilias*. (1) When the contract had been made by the express direction of the father or master, he could be made liable to the full extent by the action **quod iussu**. (2) Where the son or slave had traded with his *peculium*, the father or master could be made liable to the extent of the *peculium* employed in such trading by the action **de peculio**, and also to the extent of any profit received by him by such trading by (3) the action **in rem verso**. These actions were usually combined. The *paterfamilias* was entitled in these cases to deduct anything owing to him by the son or slave under a natural obligation. (4) Where the son or slave had traded with the *peculium* to the knowledge of the father or master, the latter could be required by an **actio tributoria** to distribute the *peculium* rateably between himself and the creditors. In this case he could not deduct what was owing to him.

When the son or slave had been employed as master of a ship (*exercitor*) or as manager of a shop (*institor*), (5) an

**actio exercitoria**, or (6) an **actio institoria**, would lie against the father or master to the full extent of contracts made by them within the scope of their authority.

(c) In early Roman Law only parties to a contract could be bound thereby. **Alteri stipulari nemo potest**. The liability of an employer for the contracts of his employees was developed by an extension of the actions available against a *paterfamilias* in respect of contracts of those under his power. The employer was made liable for contracts made by an agent employed as master of a ship or manager of a shop, although not under his power, by an extension of the actions *exercitoria* and *institoria*. By the introduction of a further action analogous to the *institoria*, viz., the **actio quasi-institoria**, any employer might be made liable on contracts made by his agent within the scope of his authority, where satisfaction could not be obtained from the agent.

**368.** *Subject to what conditions would the Prætor grant restitutio in integrum?*

The conditions under which **restitutio in integrum** might be granted were—

(1) The applicant must have suffered some prejudice (*læsio*) from the operation of law.

(2) The application must be based on some ground (*iustâ causa*) recognised by the Edict as giving rise to a claim for the relief. Six of such *causæ* are mentioned by Paulus, viz., (i.) minority, (ii.) intimidation (*metus*), (iii.) fraud (*dolus*), (iv.) excusable mistake (*iustus error*), (v.) necessary absence, (vi.) change of status.

(3) As a general rule the case must be one in which the ordinary law afforded no relief. Sometimes, however, it afforded an alternative method of proceeding where there was an existing action, e.g., in the case of *dolus*, *metus*, etc.

(4) It must be applied for originally within an *annus utilis*; extended by Justinian to a *quadriennium continuum*.

**369.** *What do you know of the remedy Restitutio in integrum? Give two illustrations of its operation.*

**369a.** *"Whereas an action supplies a remedy against a wrong, in integrum restitutio supplies a remedy against the law itself."*

*Explain this statement.*

*Illustrate the character of this restitutory process by reference to the different classes which come within its scope.*

**In integrum restitutio** was the reinstatement of an individual, on grounds of equity, in the legal position he had occupied before some occurrence which, but for the magistrate's intervention, would have operated in law to his prejudice. The Prætor, in the exercise of his *imperium*, in certain cases rescinded transactions, and as far as possible restored the *status quo ante*, on the ground that if the ordinary rules of law were allowed to have effect the individual would suffer serious injustice. The law lays down general rules and cannot deal prospectively with every individual case. The Roman Law consequently provided a remedy in the extraordinary jurisdiction of the magistrate where strict adherence to legal rules would have worked injustice. In order to obtain this extraordinary relief, however, it was not sufficient to show that advantage had been taken of the applicant to his prejudice and that no other adequate means of redress was open to him. It was necessary to show some specific ground for the magistrate's interference, *e.g.*, minority, intimidation, mistake of fact, fraud, necessary absence, *capitis deminutio*, or the like. What should amount to a sufficient ground of restitution was at first left very much to the discretion of the magistrate; but practice and juristic opinion gradually laid down the limits to which he should confine himself and settled the principles by which he was to be governed. [See Sohm, pp. 310—311.]

**370.** *What was an Interdict, and in what ways were interdicts classified? Explain particularly the interdictum Salvianum, and the interdicts uti possidetis and utrubi.*

An **Interdict** was originally an administrative order issued by the Prætor, by virtue of his *imperium*, for the prevention or punishment of offences concerning *res sacræ* or *religiøsæ* or public property, or with the object of maintaining the peace. It was in connection with the latter purpose that Interdicts came to be the means of settling questions of Possession. When put in positive terms, the order was technically termed *decretum*; when negative, forbidding something to be done, *interdictum*. The term *interdictum*, however, was often applied indiscriminately. At first, the Prætor probably inquired into the facts on complaint being made to him and pronounced his order accordingly. But in process of time it became impossible for the magistrate actually to determine the facts himself. The order then is made in general terms and becomes the basis of further legal proceedings—the question at issue being whether the magistrate's order has been disobeyed.

Interdicts were classified into (a) **Restitutory**, when the order was to make restitution or to transfer possession, (b) **Exhibitory**, when the order was to produce some person or thing, (c) **Prohibitory**, when something was forbidden.

**Possessory Interdicts** were divided into (1) **Adipiscendæ**, (2) **Retinendæ**, (3) **Reciperandæ**, *possessionis causa comparata*.

These Interdicts were also either (i.) **Single**, when the applicant was plaintiff in the proceedings which followed the order and his adversary defendant, or (ii.) **Double**, when each party was alternately both plaintiff and defendant, as in *Uti possidetis* and *Utrubi*.

The **Interdictum Salvianum** was an interdict by which a landlord was enabled to obtain possession of the effects of his tenant hypothecated for the rent.

**Uti possidetis** was an interdict for deciding rights to possession of immovables. ~~It was prohibitory and double, addressed equally to both parties, forbidding both to use force to disturb the existing state of possession; and that party eventually prevailed who proved that he was in actual possession at the time of the issue of the interdict and had not taken possession from his adversary by force, by stealth, or with his permission (*nec vi, nec clam, nec precario*).~~

The Interdict **Utrubi** was similar, and was used when the dispute was about movables. The party prevailed who had been in possession (*nec vi, nec clam, nec precario*) for a longer period during the preceding year than his adversary.

**371.** Describe the procedure on a double Interdict, e.g., *Uti possidetis*, as given by Gaius. What was the *Cascellianum Iudicium*?

A **double Interdict** was resorted to when two persons claimed possession of movable or immovable property. The Interdict *Uti possidetis* applied to immovables and the Interdict *Utrubi* to movables.

The procedure in the case of **Uti possidetis** was as follows:

The issue of the interdict was followed by a fictitious ejectment of one party by the other (**vis ex conventu**). The party ejected then summoned the other party before the Prætor, alleging a breach of the Interdict, and steps were then taken to determine the real question at issue, viz., which party was entitled to possession. The interim possession was put up to auction between them (**fructus licitatio**), the party obtaining interim possession entering into a **fructuaria stipulatio** for payment of a penal sum equal to the value of the interim profits, or, in the alternative, giving security to satisfy the judgment (**satisfactio iudicatum solvi**). Each party then wagered a penal sum in the two characters of plaintiff and defendant, for each party was both plaintiff and defendant. Each entered into a **sponsio**

and a **restipulatio**. The *sponsio* would be as follows: "If contrary to the Prætor's Edict you have offered violence to me while in possession, do you promise to pay so many sestertii?" The *restipulatio* would put the same question in the negative form. Thereby each party would be bound to pay, or entitled to receive, two penal sums according as the decision was for or against him. A judge was then appointed to try the four actions arising out of the penal *sponsiones* and *restipulationes*. If his decision was in favour of the interim possessor he condemned the other party to pay the amount of his two penal wagers. If his decision was against the interim possessor he condemned the latter to pay the amount of the two penal wagers, and he had further to condemn the latter in a fifth action brought on the *fructuaria stipulatio*, or, in the alternative, in the **iudicium fructuarium**, an action brought for the recovery of the value of the interim *fructus*. If the unsuccessful party refused to deliver up possession, a sixth action could be brought termed the **iudicium secutorium** or **Cassellianum**, which had a *formula arbitraria*, in which the judge was empowered to condemn him to pay the value of the property and the interim profits in default of restitution.

**372.** *What was the nature and purpose of the Interdict Quorum Bonorum? State its terms. Who could apply for it, and against whom was it available?*

The **Interdict Quorum Bonorum** was the remedy whereby a successor, civil or prætorian, who had obtained the formal grant of the *bonorum possessio* from the Prætor maintained his title to the succession, or to any property included in it, if his title was controverted. It was **adipiscendæ possessionis causa comparata**, i.e. for obtaining possession when the claimant was not in possession. The terms of the Interdict were: *Quorum bonorum ex edicto meo illi possessio data est, quod de his bonis pro herede aut pro possessore*

*possides, possideresve si nihil usucaptum esset, quoadquā dolo malo fecisti ut desineres possidere id illi restituas.* It could be applied for by any one to whom *bonorum possessio* had been formally granted, or, in later times, who had made *agnitio*, i.e. done some act signifying an intention to claim as *bonorum possessor*. • It was the proper remedy against two classes of persons, viz., (1) any one who claimed as successor (pro herede) whether under the Edict or as *fideicommissarius* or by the *ius civile* (2) the *prædo*, i.e., any one who seized and held without title, or merely by an occupation title.

**373.** *Justinian speaks "de interdictis seu actionibus quæ pro his exercentur."*

*How are we to account for the change from Interdict proper? When did it occur, and what was the practical extent of the change?*

The Interdict under the Formulary system had become merely a preliminary step to an action. Even before the general introduction of the system of *extraordinaria iudicia* the formal interdict was gradually falling out of use, the tendency being to at once proceed to the action arising out of it. By the time of Diocletian the formulary system had been superseded, and the Interdict had ceased to be an order published in each separate instance: it had come to be regarded as a rule of law of general validity giving rise to an action *ex interdicto* commenced and conducted like other actions.

**374.** *Describe the functions of the Roman iudex. Does he correspond to the judge or to the jury of our English system of procedure?*

The **iudex** was not a magistrate: he was a private citizen invested by the magistrate with a judicial commission in each case and for that case only. Originally he was chosen from the senators; and afterwards from the official

list of *iudices selecti* which was made up of persons whose qualification varied at different times. As the function of the *iudex* was a public one, he could not decline to act without a lawful excuse. After being sworn, he received from the prætor a *formula* containing a statement of the issue, from which he was not allowed to depart. He admitted the demand or rejected it purely and simply without having power to modify it. He was, however, not confined to pure questions of fact. He was required not only to investigate the facts but to give judgment, and in doing so, questions of law were more or less involved according to the extent of the directions contained in the *formula*. For this purpose he might consult jurisconsults; and if the question appeared to him too obscure to decide, he might decline to give judgment by declaring on oath *sibi non liquere*. [Moyle, pp. 641—2; Sohm, pp. 239—241.]

The *iudex* does not altogether correspond to either the judge or the jury of the English system. He differs from an English judge in that he was merely a private citizen appointed by the magistrate after selection by the parties. He differs from the jury in that he gave judgment according to the directions in the *formula* and did not merely find the facts. He corresponds rather to an arbitrator to whom a case is referred by the court for decision.

**375.** *Aulus (A.D. 540) by his procurator, Balbus, sues Caius, who defends by his procurator, Sempronius. What engagements must be entered into and what security given?*

Balbus must give the **cautio de rato**, i.e., security that his principal will ratify his proceedings, unless appointed *procurator* by Aulus in the presence of the judge or by a formal mandate filed in court (*mandatum actis insinuatum*).

If Caius appears in court and appoints Sempronius as his *procurator*, Caius himself must give security *iudicatum solvi*. If Sempronius is appointed out of court, he must give

security *iudicatum solvi* himself, and Caius becomes security (*fideiussor*) for the carrying out of the obligation.

[The **cautio iudicatum solvi** consisted of three parts (1) *de re iudicata*, (2) *de re defendenda*, and (3) *de dolo malo*. By the first of these, the defendant agreed, in case the action went against him, to restore the property or pay the damages assessed by the judge. By the second, he promised to defend the action; and by the third, to indemnify the plaintiff against fraudulent dealing with the subject-matter of the suit while it was in his hands.]

The defendant also gives security that he will appear in person to receive judgment or that, if he fails to do so, his *fideiussor* will pay all that is directed to be paid by the judgment. There was also an implied hypothec over his property. [See J. IV. 13. 3 and 4.]

**376.** *What were the three methods of restraining unjustifiable litigation mentioned by Justinian in the Institutes?*

I. **Pecuniary fines.** A plaintiff suing without just cause was obliged to compensate the defendant for any loss incurred and to pay the costs of the action. A defendant in many cases incurred increased liability by unjustifiably defending an action, *e.g.*, in an action under the *lex Aquilia*.

II. The requirement of an **oath** from both parties and their advocates as to the *bona fides* of the claim or defence.

III. The penalty of **infamia** which was incurred by defendants condemned in certain actions, *e.g.*, *tutela*, *mandati*, *depositi*, *pro socio*.

**377.** *What provisions existed for appeals in civil cases (1) during the Republic, (2) during the Empire?*

I. During the Republic there was no provision for appeals in the proper sense of the term. The higher magistrates having co-ordinate authority, application might be made to

one to *veto* proceedings commenced before another; and an *in integrum restitutio* might be decreed in the case of an inequitable judgment. But there was no regular procedure by way of appeal from an inferior to a superior authority.

II. With the Empire, a regular system of appeal was developed. The Emperors succeeded to the judicial powers of the republican magistrates and became the supreme appellate authority. Under Augustus, the *præfectus urbi* was constituted a judge of appeal for Rome and a *vir consularis* was appointed to hear appeals from each of the provinces. Subsequently the Prætorian præfect became a judge of appeals from the provinces. Under Nero, the Senate was invested with appellate powers co-ordinate with those of the Emperor. At a somewhat later period the practice arose of appealing from the inferior judge to the magistrate who appointed him. Hence a regular gradation of courts was established, an appeal lying from the judge to the appointing magistrate, thence to the *præfectus urbi* at Rome (or, under the earlier Emperors, in some cases to the Prætors), and to the *præses* in the Provinces, thence to the *præfectus prætorio*, and finally to the Emperor (or the Senate, so long as it continued to exercise judicial powers).

Constantine divided the Empire into four great prætorian prefectures and the *præfectus prætorio* became final judge of appeal for his prefecture. But reference could always be made to the Emperors for instructions in cases of difficulty.

**378.** Explain the following terms : *Iurisdictio* ; *Imperium* ; *Actio præiudicialis* ; *Vadimonium* ; *Exceptio cognitoria* ; *Legitimum iudicium*.

**379.** Explain the following : *Cognitio extra ordinem* ; *Intentio* ; *Præscriptio pro actore*.

**Iurisdictio** is a term expressing the power of the Prætor of administering the law in the ordinary course of procedure.

**Imperium** expresses the sovereign power vested in the Prætor, as one of the supreme magistrates, by virtue of which he was enabled to introduce remedies in cases not provided for by the *ius civile* and to modify the latter where strict adherence to it would be contrary to equity.

**Vadimonium**—Security for the performance of some obligation. In later times the term is usually applied to the security given by a defendant, who has appeared in answer to a summons, for his appearance in the later stages of the action.

**Exceptio cognitória.** An objection to the competency of a *cognitor* (a person appointed to conduct litigation on behalf of another) or to the right of a party to sue by an agent.

**Legitimum iudicium**—opposed to **Iudicium imperio continens**—was an action coming within the Prætor's *iurisdictio*, i.e., one in which the proceedings were (1) in Rome or within a mile thereof, (2) between parties who were citizens, and (3) before a single *iudex* who was also a citizen. (See 363.)

**Cognitio extra ordinem.** Where the procedure was not by *formula*, but the magistrate heard and decided the case himself without reference to a *iudex*.

**Intentio.** The clause of the *formula* in which the plaintiff's claim was set out.

**Præscriptio pro actore.** A clause inserted at the head of the *formula*, limiting the scope of the inquiry on behalf of the plaintiff in order to reserve to him rights which would otherwise have been lost by *consumptio actionis*, e.g., to prevent claims which were not yet enforceable coming into the inquiry, or to limit the ground of action to one kind of title. (See 355.)

**380.** How did the Prætor protect the rights of equitable owners? What was the **Actio Publiciana**?

By allowing an *exceptio* (e.g., *doli*, or *rei venditæ et traditæ*) where such equitable owner was defendant; and, where he was plaintiff, by means of actions based on fictions, e.g. *actio Publiciana* (see *infra*), *actio Serviana* and *actio Rutiliana* (available to the purchaser of a bankrupt estate), or actions with a formula *in factum*; or by Interdict, e.g. *Quorum Bonorum* (in favour of Prætorian successors), *possessorium* (in favour of a *bonorum emptor*), *sectorium* (in favour of a *bonorum sector*).

The **actio Publiciana** was an action based on the fiction that usucapion had been completed when in fact it had not been completed. It could be brought by anyone who had obtained usucapion possession, and, before usucapion was complete, had been deprived of possession by someone having a less equitable title.

## VII.—MISCELLANEOUS.

**381.** *Mention the chief changes in the *Ius Personarum* which were made between the time of Gaius and the end of the reign of Justinian.*

The **chief changes** were—

I. Abolition (by Justinian) of the distinctions between freedmen and consequent extinction of the classes of *Latini Iuniani* and *aditicii*.

II. Repeal (by Justinian) of the *lex Fufia Caninia* which placed restrictions on the number of slaves that could be manumitted by testament.

III. Alteration (by Justinian) of the method of emancipating children, by substituting a declaration made before a magistrate and registered in the *acta* for the old procedure by *mancipatio*: consequent disappearance of the class of persons *in mancipio*.

IV. A similar alteration effected in the method of adoption, the old procedure by *mancipatio* and *in iure cessio* being abolished.

V. Change (by Justinian) in the effects of adoption. The person adopted no longer passed into the *potestas* of his adoptive father and did not lose any of his rights in his natural family, only acquiring a right to succeed on intestacy to his adoptive father; except in the case of adoption by an ascendant (*adoptio plena*).

VI. Introduction (about the time of Gaius) of adrogation by Imperial rescript, which eventually superseded the older form of adrogation carried out with the assent of the

*Pontifex* and in the presence of thirty lictors representing the *comitia curiata*.

#### VII. Introduction of Legitimation of children

- (a) *per oblationem curiæ* (Theodosius and Valentinian).
- (b) *per subsequens matrimonium* (Constantine).
- (c) *per rescriptum principis* (Anastasius, abolished by Justin but revived by Justinian).

#### VIII. Disappearance of the perpetual tutelage of women.

IX. Introduction of the practice (by M. Aurelius) of giving general curators to persons under twenty-five years of age and gradual restriction of the capacity of minors to enter into legal transactions without concurrence of curators.

**382.** *Explain the following passages : (1) Libertini sunt qui ex iusta servitute manumissi sunt ; (2) Certæ autem rei vel causæ tutor dari non potest.*

I. "Freedmen are those who have been manumitted from legal servitude." They were a class intermediate between *ingenui* (freeborn) and *servi* (slaves). Freedmen, when made so by a manumission complying with the provisions of the **Lex Ælia Sentia**, became full Roman citizens; otherwise they took a lower status, the incidents of which were fixed by the **Lex Iunia Norbana**, and were termed **Latini Iuniani**. The slavery must have been a legal (*iusta*) slavery: thus, if a freeborn person were by mistake regarded as a slave and in ordinary course were manumitted before the mistake was discovered, he did not become a *libertinus* but was still *ingenuus*. Similarly, a person in **mancipio** on manumission was regarded as *ingenuus* not as *libertinus*. The maxim was: **natalibus non officit manumissio**.

II. "A tutor cannot be appointed for some particular property or transaction." The tutor was appointed to supplement what, owing to mental immaturity, was wanting in the legal capacity of the pupil. His function was

generally to supplement (*augere*) the *persona* of the pupil (**auctoritatem interponere**) and to manage his affairs (**negotium gerere**) during his minority. His appointment could not be restricted to some particular transaction. Where the pupil's interests in some special property or transaction required protection, a curator might be appointed.

**383.** *Enumerate and distinguish the various cases of Incapacity in Roman Law.*

I. *Servitude*. The slave had no legal rights. He could not contract, except for his master's benefit, and all his acquisitions were the property of his master.

II. *Subjection to Potestas*. The *filiusfamilias* was at first, like the slave, incapable of acquiring property for himself. Under Imperial legislation he was allowed to acquire separate property to a certain extent--**peculium castrense** and **quasi-castrense**. He could contract, but the benefit of his contracts enured to the *pater*, while he alone incurred liability. He could, however, sue on his own behalf in certain cases, viz., in the actions *iniuriarum*, *quod vi aut clam*, *depositi*, and *commodati* (Poste, note to G. I. 55).

III. *Alienage*. *Peregrini* could not take part in any transaction governed by the strict *ius civile*, except when the privilege of *commercium* had been granted to them.

IV. *Minority*. (See **71** and **81**.)

V. *Sex*. Women were under various disabilities. Under the earlier law, they were subject to perpetual tutelage. They were incapable of *potestas*, could not adopt, could not be adrogated, or act as witnesses in a mancipation. The **Lex Voconia** [B.C. 169] forbade the institution of women as heirs to persons ranked in the highest class of the census (*i.e.*, possessed of property to the value of 100,000 asses)

but permitted them to be legatees to the extent of half the testator's property. This disqualification became obsolete under the Empire. The **Sc. Velleianum** made void any *intercessio* by a woman. (See 421.)

#### VI. *Celibacy and orbitas.*

(a) The **Lex Iulia** rendered unmarried persons incapable of taking under a will as heirs or legatees, unless related to the testator within the sixth degree.

(b) The **Lex Papia Poppæa** provided that married persons without children should take only a moiety of what was left to them in a will, unless they were related to the testator within the sixth degree. They were also subjected to disabilities with reference to taking under each other's will. (See note in Moyle, II. 14.)

These restrictions were subsequently abolished by legislation of Constantius and Constans and Honorius and Theodosius.

#### VII. *Mental or physical defect.*

(a) Deaf or dumb persons could not be parties to a stipulation or make or be witnesses to a will *per æs et libram*.

(b) *Furiosi* and *mente capti*

(c) *Prodigi* were subject to *cura*.

VIII. *Religion.* Heretics, apostates, etc. were incapable of being witnesses and subject to other disabilities.

IX. *Loss of existimatio (Infamia).* Persons incurring *infamia* (1) were deprived of the *ius suffragii* and *ius honorum*, (2) could not act as procurators.

**384.** *Set out the various stages in a Surrender-in-Court (in iure cessio) in Roman Law, and indicate some of the purposes for which this procedure was used.*

See G. II. 24.

According to Gaius it was used for the following purposes—(a) conveyance, (b) manumission by *vindicta*,

- (c) adoption, (d) transfer of *utela legitima* over women.  
 (e) creation of servitudes, (f) cession of an inheritance.

It was obsolete in the time of Justinian.

**385.** *Translate and explain the following passages :*

- (a) *Femine quoque adoptare non possunt.*  
 (b) *Natalibus non officit manumissio.*  
 (c) *Auctoritas autem tutoris in quibusdam causis necessaria pupillis est, in quibusdam non est necessaria.*

(a) "Women also are unable to adopt." (See 52.)

(b) "Manumission does not affect the rights of birth."  
 (See 42.)

(c) "But the *auctoritas* (authority) of the tutor is necessary to pupils in some cases, in others it is not necessary." The general rule was that the pupil could make his position better, but not worse, without the authority of his tutor. He could bind other persons to him, but not himself to them, without such authority. So he could not give a valid discharge for payment of a debt by his debtor, and could not pay a debt to his creditor so as to make the creditor owner of the money.

**386.** *Describe the ceremony of Mancipatio, and enumerate the purposes to which it was applied.*

**Mancipatio** was the early form of conveyance. It required five witnesses who were Roman citizens over the age of puberty, and a *libripens* or balance holder, also a Roman citizen. The purchaser holding a piece of bronze (*æs*) said: "I claim this man (or thing) as mine by quiritary right, and I have bought him (or it) with this piece of bronze and the balance of bronze." He then struck the balance with the piece of bronze, which he handed to the person from whom he took the slave or thing. It was applied to the following purposes: (a) Conveyance by way of sale,

pledge, or the like; (b) emancipation of a child by his father; (c) the making of a testament (*per æs et libram*).

**387.** *What special privileges were allowed to soldiers in Roman Law?*

(1) A soldier was exempted in most particulars from the ordinary law governing the making of wills (see **294**); (2) when sued for debt, had the *beneficium competentiæ*, that is, the privilege of retaining so much of his property as would leave him means of subsistence; (3) was allowed to plead ignorance of law as a defence to a claim based on the *ius civile*.

**388.** *Explain—*

- (a) *Mulier caput et finis familiæ est*;
- (b) *Voluntas militis summa lex*;
- (c) *Semel heres semper heres*;
- (d) *Possessionem adquirimus et animo et corpore*;  
*neque per se animo aut per se corpore.*

(a) "A woman is the head and the end of a family." This expresses the agnatic basis of the Roman family. The family could not be continued through a woman, as she was not capable of *potestas* over her children. If she married and had children, her children were in the *potestas* of her husband, or of his *paterfamilias*, and were therefore not members of her own family. If she became *sui iuris* by the death of her *paterfamilias*, or by emancipation, she became a distinct head (*caput*) of a family, but it necessarily came to an end with her.

(b) "The intention of the soldier is the supreme law" (governing his testament).

Wills of soldiers made while on active service were not subject to the ordinary rules governing testaments, effect being given to the intention, in whatever way expressed, as far as was compatible with securing proof of the authenticity of such testaments (see **294**).

(c) "Once heir always heir."

The appointment of an heir did not admit of limitation as to time. An heir could not be appointed from a fixed time or until a fixed time. Such a limitation was treated as superfluous, and the institution was treated as unrestricted. This rule did not apply to military testaments.

(d) "We acquire possession by intention coupled with physical control: but not by intention only nor by physical control only."

In order to constitute legal possession there must be (1) the intention to act as owner, the *animus domini*, and (2) the fact of physical control over the thing in respect of which possession is claimed (see 91).

**339.** *What changes did Justinian make in the law on the following matters?—*

- (a) *The effect of adoption ;*
- (b) *The effect of a bare promise to make a gift ;*
- (c) *The liability of an heir to pay debts of the deceased ;*
- (d) *The time at which a contract of sale became complete.*

(a) Under Justinian's legislation the person adopted no longer lost his rights in his own family, nor did he acquire any rights in his adoptive family except a right of succession on the intestacy of the adoptive father, unless the adoptor was an ascendant, paternal or maternal, in which case adoption had its old effect.

(b) A bare promise to give was made an obligatory pact giving rise to an action against the donor to enforce it. Gifts exceeding 500 *solidi*, however, had to be registered, otherwise the excess above that sum was void.

(c) The heir was allowed to avoid liability for the debts of the deceased, beyond the amount of the assets, by accepting the inheritance with benefit of inventory (**beneficium inventarii**).

(d) When the parties had agreed to put the contract in writing, the contract was not binding until the documents had been drawn up in the handwriting of the parties, or signed by them, or formally completed by a notary (*tabellio*).

**390.** *State what remedy, if any, Titius had in the following cases :—*(1) *Titius stipulated with A. in these terms :*

*“Will you give me twenty aurei?” A. said : “I will give you ten.” A. refused to give anything.*

(2) *Titius requests B. to inquire into the solvency of C. B., willing to do a good turn to C., represents him as perfectly trustworthy. Titius thereupon lends money to C., who is really insolvent, and fails to recover the loan from C.*

(3) *Titius gives a vase to D., D. promising to give Titius a horse in exchange. D. fails to deliver the horse.*

(4) *Titius gives permission to E. to dig for chalk on his land, E. agreeing to fill up the excavations. E. fails to do so.*

(1) According to the Institutes, there would be no contract, as the question and answer do not agree [J. 3. 19. 5]. A different view is taken in the Digest [45. 1. 1. 4] in which it is laid down that the promise is good for 10 aurei. The action to enforce it would be a *condictio certi*. (2) B. is a *mandatarius*, and owing to his fiduciary character is bound to exercise *exacta diligentia*; he will, therefore, be liable to Titius for the loss sustained. (3) Titius can compel D. to deliver the horse by an *actio in factum præscriptis verbis* on the innominate contract, or, if he please, he may recover his vase by a **condictio causa data causa non secuta**. (4) Titius has an **actio in factum præscriptis verbis** against E. to enforce the performance of his bargain or payment of compensation for non-performance.

**391.** *What was the effect of an impossible condition (1) in a will, and (2) in a contract?*

(1) Justinian settled all doubts by deciding that the condition should be regarded as surplusage. The bequest was, therefore, valid. (2) The contract was void.

**392.** *To what category is to be assigned the legal relation arising in the following cases :*

(1) *A. borrows 1,000*l.* from B. and assigns to D. a farm as security on condition that he pays no interest, but the lender is to get the profits of the farm instead.*

(2) *A. and B. have each a horse, and they agree that each shall have the use of the other's horse in alternate weeks.*

(3) *A lapidary undertakes to make a brooch, from gold supplied by Titius, for the use of Titius.*

(4) *A., B., C., and D. have each a horse, and their horses are so matched that they are worth more sold as a team. A., B., C., and D. authorise E. to sell the four in one team and E. does so.*

(5) *Titius undertakes without payment to take his neighbour's cattle along with his own to market and sell them.*

(1) This is an arrangement known as **antichresis**.

(2) An innominate contract, the performance of which by either entitles him to performance by the other. (3) *Locatio conductio operis faciendi*, if the lapidary is to be paid for his services; if not, it is a contract of mandate. (4) As between A., B., C., and D., this is partnership *negotiationis alicuius*. As regards E., it is mandate, if gratuitous; otherwise *locatio conductio*. (5) Mandate.

**393.** *Compare or contrast the corresponding provisions of Roman Law with the following statements as to English Law :*

(a) *A mere voluntary courtesy is not sufficient consideration to support an action.*

(b) *There must not only be a taking, but also a carrying away, in order to constitute larceny.*

(c) *B. orders of A. a set of artificial teeth. A. takes a model of B.'s mouth, and makes the teeth. This is a contract of sale, and not for work and labour and materials, as the order was for a chattel to be delivered.*

(a) The Roman Law did not develop the general principle of Consideration in regard to contract. The

enforceability of an agreement depended on its coming under one of the recognised heads of contractual obligation (*causæ civiles*). Any other agreement was termed a *pactum* and was not as a rule actionable, whether there was valuable consideration in the English sense or not. In later Roman Law certain pacts were made actionable (*pacta vestita*) although not involving valuable consideration on the part of the promisee, e.g., the *pactum de constituta pecunia* and the *pactum donationis*.

(b) **Asportation** was not essential to theft in Roman Law. It was sufficient if there was a fraudulent dealing (**contractatio**) with the thing or the use or possession thereof in any way with the object of gain (**lucri faciendi gratia**).

(c) The Roman Law was the same if the materials were supplied by the workman; it would be *locatio conductio* if the materials were supplied by B. [J. III. 24. 4].

**394.** (1) *A. gives to his son Titius the use of his farmhouse for life.*

(2) *A. lends to Gaius a horse without remuneration.*

(3) *A. lends an ox to Sempronius on condition that Sempronius lends his ox to A.*

(4) *A. lends a horse to Mævius for one aureus a week.*

(5) *A. lets a farm to Mævius for ten aurei a year.*

(6) *A. permits Quintus to occupy a house without payment during A.'s good pleasure.*

*State with reference to each of these transactions the nature of the right or rights that arise.*

1. Titius has the *usus* of the farmhouse. He may use vegetables, hay, timber, etc., for daily needs but no more. He can dwell in the house with his family and, probably, can receive guests. He has no power of alienation, and cannot in any way alter the character of the house.

2. *Commodatum*. 3. *Innominate contract*. Having received the loan of A.'s ox, Sempronius is bound to lend his ox to A. 4. *Locatio conductio rei*. 5. *Locatio conductio rei*.

6. *Precarium*. Quintus can use the house until requested by A. to give up possession.

**395.** A.D. 300. A client, Aulus, consults you on the following matters. Give him a general account of his legal position in each case :

- (a) He and Balbus have just become co-sureties (*fideiussores*) for Caius with regard to a debt due from Caius to Davus.
- (b) He has discovered that a slave, Entychus, recently purchased by him from Caius, is the author of certain scurrilous lampoons on Mævius and the wife of Mævius, which were published about a year previously. He thinks Caius can be shown to have known of this at the time of the sale; there was no express warranty given with the slave. Mævius is now dead, having appointed as heir Davus, the father of his (Mævius') wife.
- (c) He (Aulus) recently incurred much expense in damming a river which would otherwise have overflowed on to the land of Caius, to its great damage. Caius was absent at the time. He has now returned, and laughs at Aulus' claim to be recouped his expenses.

(a) If Davus sues him he can claim the *beneficium divisionis*, requiring Davus to divide his claim between him and Balbus, provided the latter is solvent. If he pays the debt, he is entitled to have all securities and rights of action in respect of the debt transferred to him (*beneficium cessionum actionum*).

(b) He can recover any damage he incurs through non-disclosure on the sale in an action *ex empto* (D. 19. 1. 4. pr.). He can also apply to have the sale rescinded on the ground of fraud. If the sale is not rescinded, he is liable to noxal actions *iniuriarum* at the suit of both the wife of Mævius and Davus (as paterfamilias of the wife), unless a full year (*annus utilis*) has elapsed since their rights of action

accrued. Mævius having died, his right of action lapses and does not pass to his heir, the action being penal.

(c) He can recover the expense he has incurred by bringing an *actio negotiorum gestorum* against Caius.

**396.** Advise A. in the following circumstances :

- (1) *He is a farmer wishing to raise money on his implements (which he wishes to continue using) and on his crops (which are not yet mature).*
- (2) *He is a surety (fideiussor), and the creditor is suing him, although the principal debtor is solvent.*
- (3) *He has been blinded in one eye through the negligence of a friend's wife.*
- (4) *He has been the victim of a burglary. He recognised the burglar as the slave of a friend, and saw him steal valuable jewellery ; but, being afraid, he pretended to be asleep and let the slave make off with the plunder.*

(1) A. could, by informal agreement, constitute a hypothec over his implements and crops as a security. The implied hypothec of the landlord would, however, be entitled to priority.

(2) He could require the creditor to divide his claim among the solvent co-sureties (if any) and himself (**beneficium divisionis**). In the time of Justinian, he could require the creditor to sue the principal debtor first (**beneficium ordinis**). If he paid, he could require the creditor to hand over all securities and transfer his rights of action against the principal debtor and the other sureties (**beneficium cedendarum actionum**).

(3) He could bring a *utilis actio* based on the *lex Aquilia* against the friend's wife (D. 9. 2. 13. pr.). The husband would not be liable (unless the wife were in his *manus*, which had disappeared in later Roman Law).

(4) He could bring a **noxal** action *furti nec manifesti* against the friend (see D. 47. 2. 7), but the latter could

escape liability by surrendering the slave. It was not a case of *furtum manifestum* unless the thief was seized, or some attempt made to seize the thief, at the time of the theft.

**387.** *A. purchases land from B. and enters into possession and uses the produce. The land really belongs to C. Discuss A.'s position.*

In Roman Law, the vendor did not undertake, apart from special stipulation, to transfer the ownership. He was only bound to assure quiet possession of the property sold. A., therefore, cannot sue B. on a breach of warranty of title, but he can claim compensation if evicted from the land. It was usual in such contracts to stipulate for the payment of a penalty, to be paid if eviction took place. C. can recover the land unless A. has acquired it by usucapion. As A. is *bona fide* possessor, C. has no claim against him for the produce already consumed.

**388.** *State with precision the extent of liability of a master for delicts committed by a slave, and of a paterfamilias for the delicts of those under his potestas.*

In both these cases the master or *paterfamilias* was liable, but in satisfaction of judgment he could hand over the slave or son to the injured person as *noxæ*. The noxal action as regards children had become obsolete before the time of Justinian; and instead, an action could be brought against the child under *potestas* for delicts, and the father was compelled to pay the damages to the extent of the *peculium*.

**399.** *Explain Novatio, Intercessio, Expromissio, Acceptilatio, Expensilatio, Stipulatio Aquiliana.*

**Novatio** was the dissolution of one obligation by the creation of another differing from the original either in its form or in its parties, *e.g.*, substituting a new creditor or debtor. Justinian enacted that novation should not take place unless the parties so intended. **Expromissio.** A new

debtor might with the creditor's consent be substituted, even without the consent of the old debtor, just as a third party could pay the debt without consulting the debtor. \*If the consent of the old debtor were not obtained, the new debtor was called *expromissor* and the proceeding *expromissio*. If the old debtor consented, the new debtor was *delegatus* and the proceeding *delegatio*. **Intercessio**: was a general term indicating any undertaking by one person of the liabilities of another. If he were substituted for the principal debtor by novation he was called an *expromissor*. If he were added as surety to the principal debtor, he was called an *adpromissor*. *Intercessio* included both these proceedings. **Expensilatio** was an entry in the ledger (*codex*) of a creditor of a sum of money stated to be advanced to a debtor. This entry, when made with the consent of the debtor, constituted a contract *litteris*. **Stipulatio Aquiliana**. (See 238).

**400.** Explain the meaning of *Pactum*, *Obligatio Re*, *Permutatio*, and *Obligatio Ex Delicto*.

**Pactum** was an informal agreement not coming under any of the recognised heads of contract and consequently not enforceable by action; but giving rise to a *naturalis obligatio* and thus available as a defence or set-off, or to support a mortgage or suretyship. **Obligatio re** was an obligation based upon the fact that one person had received a thing by delivery, which he was bound to deal with according to the purpose for which it was given him; or upon the fact that the one party had done all that he contracted to do and there was a duty on the other to perform his part of the bargain. In other words, an *obligatio re* was a contract based on part performance. Such contracts were *mutuum*, *commodatum*, *depositum*, *pignus*, and the innominate contracts. **Permutatio**, or exchange, was an innominate contract, by which one party agreed to give a thing, other than money, in exchange for something to be

transferred by the other contracting party. The delivery of the thing by one party created an obligation on the other, enforceable by *actio in factum præscriptis verbis*, to perform his part of the agreement. **Obligatio ex delicto** was an obligation arising from a wrong done, either to person or to property, under such circumstances that the law imposed a duty on the wrongdoer to pay a penal sum to or to compensate the person injured, or, in some cases, both to pay a penal sum and to compensate the person injured.

**401.** *Explain the following: Fundus Instructus, Dies Venit, Legatum Nominis, Quarta Antonina.*

**Fundus instructus** is a farm with all its furnishing, including instruments of husbandry, stock, furniture, and all things placed there for use or convenience.

**Dies venit**: the day when the performance of an obligation may be demanded. **Legatum nominis**: a legacy of a debt due to the testator. **Quarta Antonina**. The arrogator of an *impubes*, if he emancipated or disinherited the arrogated without just cause before he attained puberty, was obliged to bequeath him one fourth of his property; otherwise it could be claimed from his heirs.

**402.** *Explain the following passages from Justinian's Institutes: (a) "Children, whether natural or adoptive, are only very rarely able to compel their parent to release them from his power." (b) "A legacy may be given not only of things belonging to the testator or heir, but also of things belonging to a third person." (c) "A stipulation has been invented, commonly called Aquilian, by which an obligation of any kind whatsoever can be clothed in stipulation form, and then extinguished by acceptilation." (d) "Theft is not confined to carrying away the property of another with intent of appropriation."*

(a) The only cases in which a child could compel the father to emancipate him or her was in the case of the

prostitution of a daughter, or the abandonment of a child by the parent, or when an arrogated *impubes* could show, when he had attained puberty, that the arrogation was unfavourable to him : he could then demand a return of his property and his emancipation. (See 54.)

(b) In the case of a legacy of a thing belonging to a third person it was obligatory on the heir to buy the thing bequeathed and to hand it over to the legatee, or, if it could not be bought, to pay its value. But there was no such obligation on the heir if the thing were not capable of being bought, *i.e.*, was a thing *extra nostrum patrimonium*, and he was not bound to pay its value. The rule only applied when the testator knew that the property belonged to some one else, and the *onus* of proving this lay upon the legatee. (J. 2. 20. 4).

(c) (See 238.)

(d) Theft included more than this : it included any dealing with the property of another against his wishes. It is defined as being the fraudulent dealing with a thing itself, or with its use, or with its possession, with the object of gain (**lucri faciendi gratia**). The borrower who applies a thing to a purpose other than that for which it is lent, knowing that he is acting contrary to the wishes of the lender, is guilty of the theft of the use : so are the depositor and creditor who use the thing deposited or pledged. The debtor who fraudulently takes away the property he has pledged with his creditor is guilty of a theft of the possession of the thing.

403. The following are passages from text-books on English Law. Consider whether they would be at all true of Roman Law as it stood in the time of Justinian : (a) "The law may be thus stated: once a bastard always a bastard." (b) "A man may devise the whole of his chattels . . . freely" (*i.e.*, without considering the claims of his children). (c) "A

*person entitled to the possession of lands does no wrong to the person wrongfully in possession by entering upon him; and it is said that by the old Common-Law, he might have entered by force. But forcible entry is now an offence under the statute of 5 Rich. II. . . . the offence is equally committed whether the person who enters by force is entitled to possession or not."*

(a) This would not be a correct statement of Roman Law in the time of Justinian. A child born of parents who were not legally married could be made legitimate, either by oblation to the *curia*, or by the subsequent legal marriage of the parents (**legitimatio per subsequens matrimonium**), or by imperial rescript, which last was introduced by Justinian to meet the case where one of the parents was dead, so that subsequent marriage was impossible. (See 48.)

(b) This statement would not be true of Roman Law. The testator was bound, in the time of Justinian, to institute or expressly disinherit all his descendants through males, whether alive or *en ventre sa mère*; otherwise the will could be set aside. Besides this, the testator was bound to make provision for his children equal to a fourth part (**portio legitima**) of what they would have taken on intestacy. If he failed to do this, the will might be attacked by an **actio de inofficioso**, if nothing were left to the children; or, if something were left, the **actio in supplementum legitimæ** might be brought to claim the difference between what was actually left by the will and the *portio legitima*. Justinian allowed these actions to be brought by children or grandchildren who had been unjustly passed over in the will of their mother or maternal grandfather; and, when the testator had no children, by parents; also by brothers and sisters (consanguineous or uterine) of the testator where *turpes personæ* had been preferred to them.

(c) The provisions of Roman Law on the subject were more stringent. By a constitution of the Emperors Valentinian, Theodosius, and Arcadius, forcible entry was forbidden under the penalties that, if the property really belonged to the person who entered by force, he should forfeit it, and if he were not the owner, he must make restoration, and also pay its value. Prior to this, the prætor had compelled the restoration of the land taken by violence by the Interdict called *unde vi*. The **lex Iulia de vi**, passed about the time of Julius Cæsar or Augustus, punished the offender with *deportatio* if he used armed force, or with the confiscation of a third of his property if he entered forcibly but without arms.

404. Advise X. in the following cases, assuming him to be a Roman citizen living in the time of Gaius: (a) X. and Y. agreed to exchange horses. X. is willing to perform his part of the bargain, but Y. refuses to perform his. (b) X. and Y. agreed to exchange horses. X. delivered his horse to Y., and the horse died shortly afterwards. Y. now declines to deliver his horse to X. (c) M. borrowed a horse from N. and died. The horse was found in M.'s stables by P., who was M.'s heir. Six months afterwards P., *bonâ fide* thinking the horse had belonged to M., sold it to X. After X. had possessed the horse for nine months, N. claimed it. (d) A valuable slave belonging to X. has been killed through the negligence of Z. It has just been discovered that Y., who died a few weeks ago, had instituted the slave in question as his heir.

(a) X. cannot compel Y. to perform his part of the bargain unless and until he, X., has actually delivered his horse to Y., because the contract of exchange (**permutatio**), is not binding until one of the parties has performed his part of the agreement.

(b) X., having performed his part of the agreement, is entitled to have it performed by Y., and can sue him for

the horse to be exchanged<sup>d</sup> or for damages (*actio in factum præscriptis verbis*).

(c) X. obtained the horse *bona fide* and *ex iusta causa*, and the acquisition was not tainted in any way. The only question is, therefore, whether he is entitled to count the six months' possession by P. It is generally admitted that he was entitled to do so in the time of Gaius, as he certainly was in the time of Justinian. That being so, X. has become quiritary owner by **usucapio**, and can successfully resist N.'s claim.

(d) X. is entitled to sue Z. under the **lex Aquilia** for the highest value of the slave during the preceding year. In assessing this value he will be able to take into account not only the value of the slave, but also the value of the inheritance which he has lost through the slave being unable to accept.

**405.** *If you see any inaccuracies as to Roman Law in the following passages, point them out :*

(a) "*The Romans were also wont to set aside testaments as being inofficiosa, deficient in natural duty, if they disinherited or totally passed by (without assigning a true and sufficient reason) any of the children of the testator. But if the child had any legacy, though ever so small, it was a proof that the testator had not lost his memory or his reason, which otherwise the law presumed : but was then supposed to have acted thus for some substantial cause ; and in such case no querela inofficiosi testamenti was allowed. Hence probably has arisen that groundless vulgar error, of the necessity of leaving the heir a shilling or some other express legacy, in order to disinherit him effectually : whereas the Law of England makes no such constrained suppositions of forgetfulness or insanity ; and, therefore, though the heir or next of kin be totally omitted, it admits no querela inofficiosi.*"

(b) “The clerical chancellors of those times, [viz., Edward III.] held [uses] to be *fideicommissa* and binding in conscience; and therefore assumed the jurisdiction which Augustus had vested in his *prætor*, of compelling the execution of such trusts.”

(c) “The *prætor Gallus Aquilius* had devised a formula by which it became possible effectually to institute a grandson by a son, who, though born after the execution of the will, became the *suus heres* of his grandfather, in consequence of the death of his (the grandson’s) father during the lifetime of the testator.”

(d) If a testator “desired to disinherit other *postumi* (daughters or grand-children), an *exheredatio ‘inter ceteros’*—in other words, a *tacit exheredatio*, not expressly mentioning the *postumi* in question—was sufficient.”

(a) This is incorrect as to the law prior to Justinian. The *querela* could be brought whenever the *legitima portio* (one fourth of what would have accrued to a child on intestacy) had not been left by the will. It would be a correct statement of the law in Justinian’s time, but it should be added that if a legacy not amounting to the *legitima portio* had been given, an *actio in supplementum legitimæ* could be brought to claim the deficiency.

(b) This is substantially correct, subject to the criticism that a regular jurisdiction for the enforcement of trusts did not arise until later, probably in the reign of Claudius. Augustus only caused trusts to be enforced in some special cases [see J. II. 23. 1].

(c) This refers to **postumi Aquiliani**. The formula in question provides for the institution or disinheritance of children of a son born after the testator’s death, the son having died in the testator’s lifetime. The above passage is inaccurate in stating the rule as applying to grandsons born after the execution of the will.

(d) In the time of Justinian all descendants had to be expressly instituted or disinherited *nominatim*. Prior to Justinian the rule was as stated in the passage.

406. In May, 1902, a case from Natal came before the Judicial Committee of the Privy Council [*Douglas v. Sander & Co.*, L. R. [1902] A. C.], in which the plaintiff alleged that, though he was barred by lapse of time from bringing the *actio redhibitoria* and the *actio quanti minoris*, yet he could bring the *actio doli*. State (1) what you know of the *actio doli*, and (2) what lapse of time barred each of the other two actions?

(1) The **actio doli**, introduced by *Aquilius Gallus* (Prætor B.C. 65) lay against any one, who by his fraud had induced the plaintiff to alter his legal position and thereby incur loss, for indemnification for the loss sustained or for rescission of the transaction or both. It was a subsidiary action and could only be brought if no other remedy was applicable.

(2) The **actio redhibitoria** was barred after six months; the **actio quanti minoris** after one year.

407. *Sempronius sells to Titius a slave and a horse. After being delivered to Titius, but before Titius has paid for him, the slave runs away and comes into the possession of Mævius. The horse is stolen from Sempronius' stable before delivery to Titius. What steps may either Sempronius or Titius take for recovery of each of these objects, and, if they cannot be recovered, who bears the loss?*

The property in the thing sold did not pass in Roman Law until the price was paid, unless credit was given or security accepted. If credit has been given, Titius can bring a *vindicatio* to recover the slave from Mævius. Otherwise, Sempronius is the person to sue; and, on

payment of the price, must assign his right of action to Titius. The horse being still undelivered, the property is in Sempronius. He can bring the *actio furti*, the *actio ad exhibendum*, a *vindictio*, or a *condictio furtiva*. On payment of the price he must assign his right of action to Titius.

The risk passes to Titius as soon as the agreement is made. Hence, the loss, in case the articles cannot be recovered, falls on him, unless Sempronius, in the case of the horse, had not taken proper care; in which case the loss would fall on Sempronius.

**408.** *Mævius drives off by force the cattle of Sempronius, which he claims as his own, and strikes and abuses the bailiff or Sempronius, who tries to protect them. Meantime Stichus, Mævius' slave, steals a bag of corn belonging to Sempronius. To what amount of redress is Sempronius entitled in respect of these wrongs?*

Sempronius can recover his cattle from Mævius and also their value, because of the forcible taking, although under a claim of right [see J. IV. 2. 1]. He can claim under the *Lex Aquilia* for any damage to his bailiff and also in respect of *iniuria*, if Mævius intended an insult to himself. He can also bring the noxal *actio furti* in respect of the theft by Mævius' slave, but the latter, in this case, can escape liability by surrendering the slave.

**409.** *Advise A. in the following circumstances :*

(1) *A. agreed to lend B. a sestertius, but by mistake handed to him in the dark an aureus, a gold coin worth about a hundred times as much. B. also did not discover the mistake at the time; but after discovering it, he spent the aureus, and denied that there had been any mistake.*

(2) *A. bought a saddle from C., which, as a matter of fact, had been stolen from B. The next day B., seeing the saddle,*

*demanded it back from A., and on A.'s refusal to restore it, seized it by force and carried it away.*

(3) *B. cut the cable by which A.'s ship was moored, so that the ship drifted out to sea and was lost.*

(1) This, in Roman Law, was theft. It was not necessary that the taking of the thing should be fraudulent (as in English Law); it was sufficient if there was a fraudulent dealing (*contrectatio*) with the thing, its use or possession, with the intention of obtaining some advantage (**lucri faciendi gratia**): Hence, A. could bring the **actio furti** and a **condictio furtiva** against B.

(2) A. could claim restoration of the saddle, since by resorting to force, B. forfeits his property (see J. IV. 2. 1).

(3) A. could recover damages in an **actio in factum** based on the *Lex Aquilia*.

**410.** *Consider the legal position of the parties in the following cases:*

(a) *A. pays B. 10 aurei, erroneously thinking that he owes B. that sum. B. takes the money under the same mistake.*

(b) *The same, except that B. knows of A.'s mistake.*

(c) *C., in the time of Justinian, rightly claims land of which D. is in possession; and, as D. will not quit, C. forcibly ejects him.*

(d) *E. (same date) is staying at F.'s inn, and his horse is injured owing to the negligence of F.'s new ostler. The ostler has come to F. with a good character.*

(a) B. is under a quasi-contractual obligation to restore the money. A. can enforce this by a **condictio indebiti**.

(b) B. is guilty of theft. A. can bring the **actio furti** for the penalty; and also the **condictio furtiva** to recover the money.

(c) D. can recover possession of the land., C. forfeits his property through using force (see J. IV. 2. 1).

(d) If the ostler be a slave, a **noxal** action under the *Lex Aquilia* would lie against F. If the ostler be a free servant, then, as it is not a case of *dolus* or *furtum* (in which case F. would be liable *quasi ex delicto*), the remedy is an action **in factum** on the quasi-contractual liability of an innkeeper to keep the guest's property safe and uninjured [see note in Moyle to IV. 5. 3].

**411.** *State generally the doctrines of Roman Law—*

(a) *When the party instituted heir was a slave (either of the testator or a third party);*

(b) *When one of the parties to a contract was a slave;*

(c) *When one of the parties concerned in a delict was a slave.*

(a) When the party instituted heir was a slave of the testator, he acquired his liberty and could not refuse the inheritance even though it was insolvent. He was allowed, however, to claim the **beneficium separationis**, *i.e.*, the privilege of keeping apart from the inheritance and retaining anything he acquired by his own exertions after the death of the testator.

When the party instituted was the slave of a third party, he could only accept the inheritance under the direction of his master, and if he entered on the inheritance he acquired it for his master.

(b) When one of the parties to a contract was a slave, the general rule of the *ius civile* was that the master could take the benefit of the contract but incurred no liability under it. But certain actions were introduced by the Prætor by which, according to circumstances, the master might be made liable to the full extent or to the extent of the *peculium* and any profit derived. (See 367).

(c) When a slave was concerned in a delict a **noxal** action lay against the master. He could escape liability by surrendering the slave.

**412.** *Seius is driving one day in Rome with reins which his coachman has often told him are not strong enough to hold his horses. The horses are frightened by the falling masonry of a house which Titius is taking down, though he has been ordered by the Ædile to discontinue work during the daytime; they break the reins, bolt, and run over and kill a slave who is a member of a troupe of dancers belonging to Mævius. Explain the legal principles involved in this case, and consider what remedy Mævius has, against whom, and what would be the measure of damages.*

Mævius is entitled to recover damages for the loss of his slave, against both Seius and Titius, both being guilty of negligence. The measure of damages will be the value of the slave and the loss incurred through the depreciation in the value of the troupe of dancers through his death [J. IV. 3. 10]. The action against Seius would be a **utilis actio** under the *lex Aquilia*, as the injury is not done *corpore*. The action against Titius would be **in factum** (D. IX. 2. 29. 5). Seius and Titius are liable *in solidum*; so that what is recovered against one would go in reduction of the damages against the other. Seius, on account of his contributory negligence, could not claim to be indemnified by Titius.

**413.** *Advise in the following cases :*

(a) *Your client has complained to Aulus, a neighbour, concerning the insecure state of one of Aulus' buildings; your client is apprehensive that if the building falls it will injure valuable property of his. Aulus declines any consideration of the matter.*

(b) *Your client is going to lend money at interest to Balbus (who is sui iuris, and of full age); he wants to know how to bind Balbus to pay the interest, whether there is any limit to the amount of interest that he can charge, and how, if at all, to secure that arrears of interest shall themselves carry interest.*

(c) *Your client complains that a neighbour, Caius, in thinning a wood through which the boundary of their estate passes, has (whether intentionally or not he cannot say) cut trees really belonging to your client and carried them away.*

(a) He should summon Aulus to appear before the Prætor. The Prætor, on the probability of damage ensuing being proved, would require Aulus to enter into a *stipulatio* undertaking to be responsible for such damage (**stipulatio damni infecti**). If he refuse the stipulation, the complainant would be put into possession.

(b) He must expressly stipulate for the payment of interest by Balbus. In the time of Justinian the limit of interest in business loans was 8 per cent., in maritime loans 12 per cent., and in ordinary loans 6 per cent. Previously, the limit of interest had varied from time to time, but was usually 12 per cent. In the time of Justinian compound interest was prohibited. It had previously been provided for by an agreement that the interest should be added to the principal and so carry interest.

(c) If Caius knew that the trees were not his property he would be liable for theft. Cutting down trees, when done fraudulently, was also a special offence under the XII. Tables. In the absence of fraudulent intention, *i.e.*, if the cutting of the trees was merely due to want of care on the part of Caius, he would be liable for *damnum iniuria* under the *lex Aquilia*.

**414.** *State any rules of Roman Law which were framed (a) in order to maintain the numbers of the free population, (b) in order to protect creditors from prejudice by reason of improper alienation of property on the part of their debtors.*

(a) The **Leges Iulia et Papia Poppæa** (A.D. 4 & A.D. 9), imposed disabilities on unmarried persons (**cœlibes**) and married persons without a legitimate child living; and gave great advantages to women having the **ius liberorum** (*i.e.*,

free-born women having three children and freed-women having four). These laws were passed by Augustus with the object of checking the decrease of the free population arising from the corruption of society at that period.

(b) The **Lex Ælia Sentia** (A.D. 4) prohibited manumissions of slaves in fraud of creditors. Conveyances or other transactions in fraud of creditors could be avoided by the creditors. To recover property fraudulently alienated the creditors had the **actio Pauliana in rem** (J. IV. 6. 6). They also had an **actio Pauliana in personam** to rescind fraudulent transactions with the debtor or to recover damages on account of such transactions. There was also an **Interdictum Fraudatorium**, the precise nature of which is obscure.

**415.** *Illustrate the hostile attitude of Roman Law towards (a) ingratitude, (b) prodigality, (c) neglect of the claims of relationship, (d) celibacy, (e) wrongful (though not criminal) enrichment at another's expense.*

(a) A *filiusfamilias* might forfeit his independence, or a freedman his liberty, by ungrateful conduct. Ingratitude on the part of the legatee was sometimes held to involve an implied revocation of a legacy.

(b) Prodigals were interdicted from the management of their property, a *curator* being appointed to administer it. They were also disabled from making a will.

(c) A will excluding or omitting, without reasonable cause, children, or ascendants (in default of children), or brothers and sisters (where a *turpis persona* had been instituted heir) could be attacked as *inofficiosum*. (See 275.)

(d) An unmarried person between the ages of twenty and sixty was disabled from taking any benefit under a will unless related to the testator within the sixth degree.

(e) Money paid which was not due under a legal or natural obligation could be recovered by a **condictio indebiti**.

Where property had been transferred under a contract and the other party refused or was unable to carry out his obligations, the property or its value could be recovered by a **condictio causa data causa non secuta**.

**416.** *Advise on the legal position of Seius in each of the following cases :*

(a) *Seius orders a dozen flasks of Falernian wine without anything being said either by himself or the shopman as to the price, and the wine is delivered accordingly.*

(b) *Seius, to show his contempt for Titius, gives Pamphilus, the slave of Titius, a box on the ear. .*

(c) *Seius borrows a horse from Titius for a ride, but takes it out hunting.*

(d) *Seius finds a ring belonging to Titius and tries to restore it to its owner, but not finding Titius at once, alters his mind, conceals the ring and determines to keep it for himself.*

(e) *Seius, in the time of Justinian, honestly but erroneously thinking a house belonged to him, forcibly enters and takes possession of it.*

(a) As no price is fixed, there is not a contract of sale. The transaction gives rise to an innominate contract (*do ut des*), which can be enforced against Seius by an **actio in factum præscriptis verbis**. Alternatively, the shopkeeper may claim the restoration of the wine or its value by bringing a **condictio causa data causa non secuta**.

(b) Titius may bring the *actio iniuriarum* on account of the insult to himself.

(c) Seius is liable for *furtum* if he made use of the horse fraudulently. Otherwise, he is only liable to an *actio commodati* for any damage done to the horse.

(d) Seius may be sued for a penalty of double the value (*actio furti nec manifesti*) ; and a *condictio furtiva* will also lie

against him for restoration of the ring. An **actio ad exhibendum** can also be brought to obtain production of the ring.

(e) Seius must restore possession to the person he has dispossessed and also is liable to a penalty equivalent to the value of the house. (See J. IV. 2. 1).

**417.** *Titius has received a ring in pledge, has borrowed a horse and ten aurei in money, and has promised by stipulation to deliver a flock of sheep to Gaius. A fire breaking out on his farm, all these objects are destroyed. What, if any, is his liability in respect of each of them, or what must he prove to clear himself from liability?*

If Titius can prove that the fire was due to accident and that he was in no way to blame, he is under no liability in respect of the ring or of the flock of sheep. As regards the money, the contract being *mutuum*, he is still liable to repay the sum lent.

**418.** *Explain the nature of the legal relations arising in the following circumstances :*

(1) *Titius pays a sum of money into his account at his banker's.*

(2) *Lucius and Sempronius are joint legatees of a farm. Lucius has gathered the crops for the year, but refuses any share to Sempronius.*

(3) *Seius is in negotiation with Gaius for the purchase of a horse. Gaius sends a horse to Seius for trial for a week, the price being five aurei.*

(4) *Paulus at the request of Titius lends fifty aurei to Lucius.*

(1) This is a contract known as **depositum irregulare**, a species of loan. The banker is not bound to restore the specific coins, but only to pay Titius an equal sum on demand. (See 176.)

(2) Lucius and Sempronius are co-owners. Lucius can enforce division by an action **communi dividundo**.

(3) This is a sale subject to a suspensive condition. There is no contract until Seius expresses his approval of and agrees to take the horse; but he is liable for any injury or for the loss of the horse, if due to his negligence.

(4) This is an instance of **mandatum qualificatum**: Titius becomes a surety for the repayment of the sum by Lucius, and in default of repayment by Lucius is liable in an *actio mandati*.

**419.** In *Wright v. Sarmuda* [(1793), 2 *Phill. Eccles. Rep.*, p. 269] Sir William Scott said, in argument: "According to the Roman Law, *agnatione postumi vel quasi-postumi rumpitur testamentum*—on the death of the child the will revived if *quasi-postumus* only, that is, though not strictly by the civil law, yet *dabatur possessio secundum tabulas* by the *Prætorian Law* (*Voet ad Dig.* 28)."

Explain (a) *postumus*; (b) *quasi-postumus*; (c) *bonorum possessio secundum tabulas*.

(a) A child born after the father's death.

(b) A person who became a *suus heres* of a testator, after the making of his will, by the death or *capitis diminutio* of his father during the lifetime of such testator. [The *lex Iunia Velleia* allowed such persons to be instituted or disinherited in a will.]

(c) The grant of possession of testator's estate by the *Prætor* to the persons named as heirs in a properly executed will, or a will informal through omission of the *mancipatio*, but complying with *prætorian* requirements, *i.e.*, bearing the seals of seven witnesses.

**420.** Give illustrations from *Justinian's Institutes* of rules of law derived from (a) the *Ædiles' edict*, (b) *Imperial edicta* or *rescripta*.

(a) From the *Ædiles' edict*—

(1) Warranty against secret defects implied in a contract of sale.

(2) Warranty against eviction in contracts of sale and of hiring.

(3) The rule making it penal to bring dangerous animals on to the public roads [J. IV. 9. 1].

(b) From Imperial *edicta* or *rescripta*—

(1) The rules settling the incidents of *Emphyteusis*.  
• [Zeno.]

(2) The rule as to *læsio enormis*. [Diocletian.]

(3) The *beneficium divisionis*. [Hadrian.]

(4) The *beneficium ordinis*. [Justinian.]

**421.** Give an account of the disabilities dependent on sex in Roman Law. How did Roman Law differ from English Law in its treatment of Prodigals?

I. So long as the perpetual tutelage of women existed, women were under an incapacity to perform certain legal acts without the *auctoritas* of their tutors. Thus, they could not alienate *res Mancipi* belonging to them, nor bind themselves by contract, nor take part in any legal transaction governed by the old *ius civile*, without the *auctoritas* of their tutors. They could, however, deal with *res nec Mancipi* belonging to them, either by way of conveyance or contract, without the intervention of the tutor.

II. Women could not hold public offices (*publica munera*).

III. Women were not as a rule allowed to act as procurators, nor as tutors. [Justinian allowed the mother or grandmother to be appointed tutors to their children or grandchildren if no testamentary tutor were appointed, provided they abstained from re-marriage.]

IV. Women, not being capable of *potestas*, could not adopt; nor could they be arrogated, as they had no place in the *comitia curiata*.

V. Until Justinian's legislation, women agnates (except in the case of a *consanguinea*) were under disabilities as regards intestate succession.

VI. The *Lex Voconia* (B.C. 169) disabled women from being appointed heirs where the testator was registered at the census as having 100,000 *asses* or upwards, and prohibited them from being legatees to a greater extent than half the estate.

VII. By the *Sc. Velleianum* (about 46 A.D.), women were prohibited from entering into any contract by way of *intercessio*.

In Roman Law, a prodigal might be interdicted from dealing with his property or otherwise managing his affairs; a curator being appointed to look after his property and generally to act for him. He was also disabled from making a will. There are no such provisions in English Law. Our law contains no means for restraining a man of full age, who is not of unsound mind, from dissipating his property recklessly.

**422.** *What, in Roman Law, were the rights of riparian owners?*

The owners of the adjoining lands were regarded as owners of the banks of a river, and had the right to take the fruits, cut the rushes, and fell trees; but, in the case of a public river (that is, a river in which the flow of water is continuous as opposed to an intermittent stream), this was subject to the dominant right of the public to use the banks for purposes connected with navigation or passage. Hence it was not permitted to throw a private bridge across the river [D. 43. 12. 4] or to make an unreasonable diversion of water [D. 43. 20. 3. 1], or to obstruct the navigation of the river or use of its banks [D. 43. 12. 1 pr.]. If a river permanently took a new channel, the owners of the lands adjoining its former channel acquired property in the latter. Also, if an island were formed in a river, the riparian owners acquired the property according to a line running down the centre of the channel.

**423.** *What were the principal cases in which a person might be represented by another person in a legal act?*

In early Roman Law, representation of one person by another, except in the case of slaves or persons *in potestate* acting on behalf of the master or *paterfamilias*, was strictly excluded. "*Per extraneam personam nihil adquiri posse.*" "*Si quis alii, quam cuius iuri subiectus sit, stipuletur, nihil agit.*" But a person might acquire property through or take the benefit of a contract made by a person in his *potestas* or a slave belonging to or *bona fide* possessed by him or of whom he had the usufruct; and, after the development of the law through the Prætor's Edict, could in the majority of cases be made liable on such a contract (through the actions **adiectitiæ qualitatis** described in J. IV. 7.).

It was recognised soon after the time of Gaius that *possession* could be acquired *per extraneam personam*; and this was definitely confirmed by a constitution of Severus. Consequently, when delivery became the sole mode of transferring ownership, ownership could also be acquired by an agent.

With regard to contract, it would appear that, even in the later law, an agent could not act in the name of the principal so as to enable the principal to sue directly. The agent contracted in his own name and then transferred his rights to the principal, who could sue by an *actio utilis*. Savigny is of opinion that no transfer was necessary, but on seemingly inadequate grounds (see Moyle, p. 507). By an extension of the *actio institoria* the principal could be made liable on contracts made by an agent.

Representation in litigation was allowed generally in later procedure, at first by means of *cognitors* (special agents formally appointed for a single action in the presence of the other party), and afterwards by *procurators* (general agents, for whose appointment no special formalities were necessary). Under the older system of *legis actiones* representation was only admitted in actions *pro populo*, *pro*

*libertate, pro tutela*, actions for theft (under the *Lex Hostilia*) where the injured person was absent or captive or under tutelage, and a few other cases under special statutes.

**424.** *Illustrate from the Institutes the truth of Sir Henry Maine's remark that in Roman Law "offences which we are accustomed to regard exclusively as crimes are exclusively treated as torts."*

Theft (*furtum*) and robbery (*vi bona rapta*) are both treated in the Institutes as wrongs against the individual, giving rise to civil actions for restitution and penalties. In modern English Law they are classed as crimes. In later Roman Law the injured person had the option between a civil action and a criminal prosecution. (D. 47. 2. 93.)

**425.** *Explain the meaning of the following expressions as used in Justinian's legislation: Cognitio Extraordinaria, Exceptio Dilatoria, Chirographum.*

**Cognitio Extraordinaria.** During the period of Formulary procedure the Prætor reserved certain cases for his own cognisance and determined them without reference to a *iudex*. In these cases the procedure was said to be *extra ordinem*, i.e., outside the "*ordo*" or usual procedure. This mode of procedure was gradually extended under the Empire, and eventually superseded the Formulary procedure.

**Exceptio Dilatoria** was a plea objecting to the action that it had been prematurely brought or to the competency of the cognitor or procurator of the plaintiff, but, not going to the merits of the claim. In the classical period, the effect of a dilatory exception was the same, for all practical purposes, as that of a *peremptory* exception (i.e., one going to the merits), for, if proved, it led to judgment for the defendant which would be a bar to a further action. In Justinian's time, it only involved postponement of the action or liability to pay costs, or both.

**Chirographum** was a written acknowledgment of debt, signed by the debtor only, in use among provincials in the time of Gaius, in which the debtor, without stating the real ground of liability, merely declared the debt or that he would pay a particular sum. It constituted a contract *litteris* and was enforceable by a *condictio certi*.

**426.** *What was infamia? State as many cases as you can in which this penalty was incurred, and explain its effect on the legal position of the person incurring it.*

**Infamia** was loss of civic reputation. It was incurred by persons condemned in a *iudicium publicum* or in a number of civil actions involving fraudulent or dishonourable conduct, *e.g.*, actions on account of theft, robbery, *iniuria*, and fraud, and the actions *tutelæ*, *mandati*, *depositi* and *pro socio*; also the *actio fiduciæ* (under the older law). It also attached to bankrupts, tutors and curators removed on account of fraud, persons discharged with ignominy from military service, persons found guilty of usury, wives taken in adultery, guardians marrying their female wards under age, and persons proving false to their oath.

*Infamia* involved serious political and civil disabilities. Under the Republic the *infamis* was excluded from the suffrage and from holding any office (**suffragium et honores**). The exclusion from public offices was continued under the Empire. Infamous persons were disqualified from acting in litigation on behalf of others and could not appoint a *cognitor* or *procurator*.

Certain matrimonial disabilities were imposed on them by the *Lex Iulia de maritandis*; but these were abolished by Justinian. Finally, in many legal transactions infamous persons were declared incapable of acting as witnesses.

**427.** (1) “A surety has the following privileges: (a) That he cannot be proceeded against until the principal has been resorted to; (b) if others have made themselves sureties

together with himself, he has the right of dividing the liability and escaping with payment of his share."

(2) In 1875 *L. sued W. in the Courts of Cape Colony for £45, the price of a diamond ring, the fair marketable value of which was £20; he failed on the ground of læsio enormis. Trace the principles of Roman-Dutch Law set out in (1), and those applied in (2), to their origin in Roman Law, and compare in each case with modern English Law.*

(1) (a) is derived from the *beneficium ordinis* (or *discussionis* or *excussionis*) introduced by Justinian in Novel 4 (A.D. 539).

(1) (b) from the *beneficium divisionis* introduced by Hadrian.

In English Law, the surety cannot compel the creditor to sue the principal debtor or to divide his claim among the co-sureties. He may, however, take proceedings against the principal debtor to compel him to pay the creditor, when the latter has a present right to sue and omits to do so (termed an action *quia timet*); and he has a right to contribution from the co-sureties. He can enforce his right to indemnity from the principal debtor and to contribution from the co-sureties by bringing them in as third parties in any action commenced by the creditor against him, or by independent action.

## (2) **Læsio enormis.**

By two rescripts of Diocletian, if a thing were sold for less than half its real value, the seller might rescind the sale unless the buyer was prepared to pay so much in addition as would make the price a fair one. It was doubtful whether the buyer could rescind the contract, where the price was double the value of the thing sold, unless the seller agreed to take a fair price.

In English Law, inadequacy of price or excessive price does not affect the contract, unless it is such as to raise a presumption of fraud.

**428.** *Could a Paterfamilias be sued, at any period of Roman Law, on a contract entered into by his Filiusfamilias?*

*What is meant by saying that the Romans never developed a perfect law of Agency in Contract? How far did the Roman Law ever go in that direction?*

A Paterfamilias was not liable under the ancient *ius civile* on contracts made by a *filiusfamilias*. The Prætors, however, gradually introduced a series of actions by which the *paterfamilias* might be held wholly or partially responsible on such contracts. Where the son acted by the express orders of the father, the latter could be made liable to the full extent in an action (1) **Quod iussu**. So also, where the son had acted as master of a ship or manager of a business with the father's knowledge and consent, the actions (2) **exercitoria** or (3) **institoria** could be brought against the father. Further, where the son had traded with his *peculium*, the father could be made liable to the extent of the *peculium*, and also for any benefit accruing to his estate, by the action (4) **de peculio** and (5) **in rem verso**, subject to a right to deduct any claims he had against the son. Another action available against the father in respect of the *peculium* was (6) the **actio tributoria**, by which the father might be required to distribute the *peculium* rateably between himself and other creditors according to the respective amounts of his own and their claims.

In Roman Law the agent was always personally liable on contracts made by him; and although, in its later developments, the principal could also be sued, the law never reached the point attained by modern systems, which exempt from liability a person who contracts as agent for a known principal and who does not pledge his own credit.

The nearest approach to a proper recognition of agency made in Roman Law was the extension of the *actio institoria* to all cases of agency (**actio quasi-institoria**), so

that a principal might be made liable on all contracts made by an agent within the general scope of his authority.

**429.** *A Roman citizen consulted a jurist concerning the making of his will. What advice should the jurist have given according as he was living at the time of (a) Cicero, (b) Gaius, (c) Tribonian?*

*He had three sons: (1) Aulus, emancipated with children; (2) Balbus, who had married a wealthy woman; (3) Caius, who had been adopted by Seius. He had also a married daughter, Lucia. He wanted to leave Aulus a large paternal estate called Villa Tuscana. On Balbus he wished to settle, as strictly as possible, a small farm which came to him (the testator) through his wife. He did not wish to make any other provisions, except a legacy to Xenos, an alien. All the residue of his property he wished to be divided in the proportion of two to one between his friends, Numerius and Valens, both Roman citizens.*

*(a) In the time of Cicero* He should make Numerius and Valens co-heirs, Numerius being made *heres ex besse* and Valens *heres ex triente*. He should disinherit Aulus and Balbus by name and insert a general clause disinheriting all others, which would include his daughter, and his daughter-in-law, if in his *potestas*. He should then bequeath the paternal estate, Villa Tuscana, to Aulus as a legacy; and the farm to the children of Balbus, if he has any, and, if he has none, to any other members of testator's family he might desire to benefit, subject to a usufruct in favour of Balbus. He might give the farm to Balbus and impose a trust to hand it over to his children, but this would not, at that time, have been legally binding. He could not give a legacy to Xenos, as the latter had not *testamentifactio*. He must take care that Aulus, Balbus, and Lucia received at least one-fourth of what they would be entitled to on his intestacy.

(b) *In the time of Gaius.* His dispositions would be the same, except that he could bequeath the farm directly to Balbus, subject to a trust in favour of his children and remoter issue within limits not clearly defined in the authorities.

He could not benefit Xenos either by way of legacy or trust, Hadrian having declared trusts in favour of aliens void.

(c) *In the time of Tribonian.* He would have to disinherit all his children, including Caius, *nominatim*. He must give to each child, Caius included, at least one-fourth (by subsequent legislation one-third) of what such child would be entitled to in case of intestacy. He could strictly settle the farm by way of trust on Balbus and his descendants to the fourth generation. In other respects his dispositions would be the same as before.

**430.** *Sempronius, who is sailing from Rome to Alexandria, desires to transfer to Titius a debt of 200 aurei which Seius owes him. By what different means may he accomplish this object?*

In the earlier law this could only be effected by **novatio**, the substitution of Titius as creditor in place of Sempronius; Titius stipulating for payment of the debt from Seius, and Sempronius at the same time releasing Seius by *acceptilatio*; or by means of a fresh contract *litteris* (**nomina transcriptitia**), Titius entering Seius as his debtor in his *codex* and Sempronius entering up satisfaction of the debt in his *codex*. In later Roman Law Sempronius could appoint Titius his agent or procurator (**in rem suam**). Titius would then be entitled to accept payment and give a discharge to Seius, or, in default of payment, to sue him in Sempronius' name, the condemnation being in his own (Titius') name [G. IV. 86 and 87].

**431.** *In what cases could X. sue upon a contract entered into between Y. and Z.?*

*What was stipulatio præpostera?*

In earlier Roman Law, X. could only sue on the contract in his own name if there had been a *novation*, by the substitution of X. as a contracting party: this was really forming a new contract.

Y. could give X. a mandate to sue in his (Y.'s) name and then X. could sue as **procurator in rem suam**, but the action would nominally be on Y.'s behalf. Antoninus Pius gave the buyer of an inheritance a *utilis actio* in his own name against the debtors of the inheritance, and before the time of Diocletian this had been extended to assignees generally.

**Stipulatio præpostera.** A conditional stipulation in which the date fixed for payment or performance of the promise was anterior to the accomplishment of the condition, e.g., "If your ship shall arrive next month from Asia, do you promise to-day?" Such a stipulation was void before Justinian's legislation. He enacted that it should be enforceable as a contract subject to a condition subsequent.

**432.** *Titius took two of his slaves for a drive in a carriage and pair, when through a collision caused by the negligence of Seius in running into them the whole party were thrown over an embankment. Titius himself breaks his leg; his slave Pamphilus, who until he lost his arm six months previously had been a skilled artist, is killed; his slave Stichus breaks his arm, and is laid up for two months under medical attendance; his dog is badly wounded, and one of the horses, which as a pair were worth 300 aurei, though, separately, only 50 aurei each, is killed. What rules and principles would you apply in ascertaining the damages which Titius is entitled to recover?*

He could recover damages by an *actio utilis* under the *lex Aquilia* for his own injuries and any consequent loss

sustained; in respect of the slave Pamphilus he could recover, by an action under the first section of the *lex Aquilia*, his highest value during the previous year, i.e., his value before the loss of his arm; in respect of Stichus, he could recover, under the third section, for medical expenses, loss of service, and any diminution in his value; in respect of the dog, he could recover, under the third section, any expenses incurred in curing and any diminution in value of the animal; in respect of the horse, he could recover, under the first section, the value of the horse as being one of a pair, not merely its individual value [see J. IV. 3. 9 and 10; and notes in Moyle to IV. 10 and 16].

433. In Digest XXIV. 1. 3. we read, “The rule is based on the following principle in an oration of the Emperor Antoninus (*oratione imperatoris Antonini*), where he says, ‘Our forefathers forbade gifts between husband and wife. . . .’”

*Explain the above phrase.*

*Say what you know of the rule forbidding the gifts mentioned above and of the influence it has exerted on any modern systems of law.*

The expression “**oration**” was applied to the speech or message by which the Emperors introduced proposals for legislation to the Senate. These *orations* came in time to be regarded as law apart from the *senatusconsulta* embodying the proposed enactments.

The rule referred to is ascribed to custom. Gifts between husband and wife do not appear to have been prohibited by the *Lex Cincia* (B.C. 203 ?) and the prohibition in question is probably due to a usage of later growth. It is perhaps connected with the disappearance of *manus*, as the effect of gifts to the wife by the husband, or *vice versa*, after the wife ceased to come into the husband's power, would be to diminish property over which their respective agnates had claims. Ulpian gives as a reason for the prohibition,

"*ne mutuo amore invicem spoliarentur.*" Africanus is quoted by Paul as giving as a further reason, that gifts might be extorted by threats of divorce. The prohibition did not extend to customary presents or gifts *mortis causa* and a few other cases. A *senatusconsultum*, enacted at the instance of Caracalla (A.D. 206), provided that such gifts should not be altogether void, but that they should be revocable at any time during the marriage, and also if the donee predeceased the donor, or if a divorce ensued (D. 24. 1. 32).

This rule has been adopted, with various modifications, by those modern systems of law which are in a great measure based on the developed Roman Law. Thus, in French and Scotch Law, gifts between husband and wife are revocable; and in Roman-Dutch Law such gifts are, with certain exceptions, void.

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## APPENDIX.

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### A. LEGES

**Æbutia** (B.C. 170 ?) : authorised the use of the *formula* in actions between Roman citizens. (See 338.)

**Ælia Sentia** (A.D. 4) : enacted (1) that no manumission should have complete legal effect, *i.e.*, should confer citizenship, unless (a) the slave were thirty years of age and the master twenty ; or, if under that age, (b) the enfranchisement took place by *vindicta*, after approval by the Council having the supervision of manumissions : (2) that slaves manumitted after suffering an infamous punishment should not become citizens but should be ranked as *dediticii* : (3) that manumissions in fraud of creditors should be void. (See 35.)

**Anastasiana** (about A.D. 498) : enacted that the assignee of an obligation should not recover more from the debtor than he had himself paid for the assignment together with interest at the ordinary rate. (See 235.)

**Apuleia** (date uncertain) : gave to a *sponsor* or *fidepromissor* who paid the whole debt the *actio pro socio* to recover from his co-sureties what he had paid in excess of his share. (See 213.)

**Aquilia** (B.C. 287) : enacted (1) that anyone wilfully or negligently killing a slave or any quadruped coming under the description of cattle (*pecus*) should be liable to the owner for the highest value of such slave or quadruped within the preceding year (1st section) ; (2) that for any other injury to property the wrongdoer should be liable to damages calculated with reference to the highest value of the thing injured during the thirty days immediately preceding (3rd section). The second section provided that an

*adstipulator* wrongfully releasing the debtor should be liable to damages : this section was obsolete in the time of Justinian. (See 255.)

**Atilia** (before B.C. 188) : conferred on the urban Prætor, acting in conjunction with a majority of the tribunes of the plebs, the power of appointing tutors, in the city of Rome, in default of testamentary or statutory tutors. (See 77.)

**Atinia** (second century B.C.) : provided that *usucapio* should not be applicable to things stolen. (See 127.)

**Calpurnia** (date uncertain, probably early in the third century B.C.) : extended the *legis actio per condictionem* to cases in which the defendant was under an obligation to deliver things certain other than money. (Cf. *Lex Silia*.)

**Canuleia** (B.C. 445) : permitted marriage between patricians and plebeians.

**Cicereia** (B.C. 173.) A creditor, on taking security by *sponsio* or *fidepromissio*, must state openly (1) the amount of the debt guaranteed, and (2) the number of the proposed sureties. Otherwise the sureties could, within thirty days, procure their release.

**Cincia de donis** (B.C. 203) avoided gifts, except where donee was related to donor by cognation or affinity, or as patron, or was under the tutelage of the donor, (1) if they exceeded a certain maximum, the amount of which is not known ; or (2) if there had not been a complete transfer of ownership and possession. (See 138.)

**Claudia** (A.D. 47) : abolished the agnatic tutelage of women. (See 72.)

**Cornelia de edictis** (B.C. 67) : forbade the prætors to vary or depart from the rules laid down in their perpetual edicts. (See 12.)

**Cornelia de falsis** (B.C. 81) : imposed criminal penalties on persons forging wills or other instruments. Amongst other provisions, it was made punishable to forge the will of a person who died in captivity ; and by the construction put on this provision (*actio legis Corneliæ*), wills of such persons (which were previously

void) were treated as valid, the inference being that it could not have been intended to punish the forgery of a void instrument.

**Cornelia de iniuriis** (B.C. 81) provided for the punishment of persons guilty of assault or forcible entry. A civil action, based on the statute, was also introduced, having the advantage over the ordinary action *de iniuria* in not being limited to one year. (See J. IV. 4. 8.)

**Cornelia de sponsu** (B.C. 81): No one to be allowed to bind himself as surety on behalf of the same debtor to the same creditor in the same year, in respect of money lent, to a greater amount than 20,000 sesterces.

**Cornelia de sicariis** (B.C. 81) punished wilful homicide and poisoning with *aquæ et ignis interdictio*. (See 33.)

**XII. Tabularum** (B.C. 450—449). See Appendix in Muirhead.

**Falcidia** (B.C. 40): provided that one-fourth of the nett value of the inheritance must be left to the heir. (See 312.)

**Fufia Caninia** (A.D. 8): prohibited the manumission by testament of more than a certain proportion of testator's slaves. (See 35.)

**Furia testamentaria** (date uncertain: prior to B.C. 169): imposed a penalty of four times the excess on any person, not being a near relation, who received by way of legacy or *donatio mortis causa* more than 1,000 *asses* from the same person.

**Furia de sponsu** (B.C. 95?): Obligation of *sponsor* and *fidepromissor* limited to two years. Where there were two or more of such sureties, the liability was to be divided among those living at the time of the demand for payment without reference to their solvency. (See 213.)

**Genucia** (about B.C. 340): prohibited the taking of interest on loans of money. (See 177.)

**Horatia Valeria** (B.C. 449): gave the force of *leges* to enactments of the *concilium plebis*, subject to confirmation by the *comitia centuriata* and the Senate. (See 6.)

**Hortensia** (B.C. 287) : gave to *plebiscita*, i.e., enactments of the *concilium plebis*, the force of *leges*, dispensing with the necessity of confirmation by the Senate. (See 6.)

**Julia de adulteriis coercendis** (B.C. 18) : contained a variety of provisions dealing with marriage and *dos*. It prohibited marriage between freeborn persons and certain classes of infamous persons and between senators or their children and *libertine*. One portion of this statute is known as *Lex I. de fundo dotali* (which see).

**Julia de bonorum cessione** (Julius Cæsar or Augustus) : allowing insolvent debtors, when their insolvency was not due to misconduct on their part, to avoid imprisonment and infamy by surrendering their property to their creditors. (See 335.)

**Julia de fundo dotali** (B.C. 18) : imposed a legal duty on the father to provide a *dos* for his daughter if he had sufficient means. It prohibited the alienation without the wife's consent, or mortgage, even with her consent, of immovables on Italian soil belonging to the *dos*. (See 65.)

**Julia de iudiciis privatis** (Augustus) : superseded the procedure by *legis actio* by making the formulary procedure compulsory, except in cases coming before the Centumviral Court and cases of *damnum infectum*. [Cf. *Æbutia*.] (See 338.)

**Julia de maritandis ordinibus** (A.D. 4) : afterwards supplemented by the *Lex Papia Poppæa*, the combined enactment being known as the *Lex Julia et Papia Poppæa*. (See *Papia Poppæa*.)

**Julia de vi** (Julius Cæsar or Augustus) provided for the punishment of persons guilty of violence whether with or without armed force. In the latter case the penalty was deportation ; in the former, confiscation of a third of the offender's property.

**Julia et Plautia** (date uncertain) : prohibited the acquisition by *usucapio* of things taken by violence. (See 127.)

**Julia et Titia** (B.C. 31) : provided for the appointment of tutors in the provinces by the *prævides* when there were no testamentary or statutory tutors. (See 77.)

**Iunia Norbana** (A.D. 19) : gave to freedmen whose manumission was defective the status of *Latini coloniarum* subject to certain disabilities, e.g., making or taking under a will or being appointed tutor. They were thence called *Latini Iuniani*. (See 34.)

**Iunia Velleia** (A.D. 10) : enabled a testator to institute or disinherit (1) any person who, being conceived before the date of the will, might subsequently be born his *suus heres* in his lifetime ; (2) a grandchild or other descendant who, being born before the date of the will, might become a *suus heres* in the testator's lifetime by the death of the father. (See 278.)

**Minicia** (date uncertain) : Children of a *peregrinus* and a Roman mother were to follow the condition of the parent of lower status, i.e., were to be regarded as *peregrini*. (See 62.)

**Ovinia** (about B.C. 320) : directed the censors, in making additions to the Senate, to choose the persons most eligible on the ground of merit without distinction of order, i.e., whether patricians or plebeians.

**Papia Poppæa** (A.D. 9) : Unmarried persons (*celibes*), not being related to the testator within the sixth degree, disabled from taking any benefit under a will. Married persons without children (*orbi*), not being related as aforesaid, were only to receive half of what was bequeathed to them. Special privileges granted to persons having children. (See 414.)

**Petronia** (early Empire) : prohibited the practice of exposing slaves to contests with wild beasts. (See 33.)

**Plætoria** (about B.C. 200) : provided that any one fraudulently taking advantage of a youth under twenty-five years of age should be liable to criminal prosecution and to infamy. (See 80.)

**Plautia**. (See *Julia et Plautia*).

**Postillia Papiria** (B.C. 326) : restricted *manus iniectio* to cases in which a judgment had been obtained and cases in which it was expressly authorised by statute. It also prohibited the use of fetters except in the case of persons imprisoned for crime or delict. (See 335.)

**Publilia** (B.C. 339) : provided that *plebiscita* should have the force of *leges* but (probably) subject to confirmation by the Senate. (See 6.)

**Publilia de Sponsoribus** (date uncertain) : A *sponsor* who paid the debt, unless repaid within six months, could recover twice the amount by the *actio depensi*, a form of *manus iniectio*.

**Rhodia de iactu** : provided for the apportionment of the loss, in case of cargo thrown overboard to save the ship, between the owners of the vessel and the owners of the cargo saved.

**Scribonia** (date uncertain) : excluded the operation of *usucapio* in the case of praedial servitudes. (See 127.)

**Silia** (date uncertain ; probably early in third century B.C.) : introduced the *legis actio* termed *condictio*, to enforce an obligation to pay a sum certain. (Cf. **Lex Calpurnia**.)

**Valeria**. (See *Horatia Valeria*.)

**Vallia** (2nd century B.C.) : restricted the severer form of *manus iniectio* [i.e., where the debtor was only allowed to defend the action by a *vinculus*] to the cases of (a) the *indicatus*, (b) *oris confessus* (where the debt was admitted *in iure*), and (c) the defaulting principal under the *lex Publilia*. In other cases the debtor was to be allowed to defend himself personally (*manus iniectio pura*).

**Velleia**. (See *Iunia Velleia*.)

**Voconia** (B.C. 169) : (1) prohibited the institution of a woman as heir to a person rated in the census at 100,000 *asses*, but (2) allowed a woman, in such cases, to receive half the property by way of legacy ; (3) no legatee to be allowed to receive more than the heir. (See 383.)

**Zenoniana** : an enactment of Zeno laying down definite rules regarding *Emphyteusis*. (See 111.)

## B.--SENATUSCONSULTA.

**Claudianum** (Claudius): If a freeborn woman persisted in cohabiting with a slave without the consent of the slave's master, she might, after three denunciations by the latter, be awarded to him as a slave, all her property and rights passing to him by way of universal succession. [Repealed by Justinian.] (See 267.)

**Inventianum** (Hadrian): enabling the heir to recover any profit derived out of the inheritance by any person in possession thereof whether *boni fide* or *malii fide*, and abolishing *usucapio pro herede*. (See 128.) •

**Libonianum** (Tiberius): If one person wrote out the will of another, any disposition contained therein in his own favour was to be void.

**Macedonianum** (Claudius or Vespasian): enacted that no action should be maintained to recover money lent to a *filiusfamilias*. There were, however, many exceptions to its operation, e.g., money lent to purchase necessities. (See Note to IV. 7. 7 in Moyle). (See 215.)

**Neronianum** (Nero): provided that a legacy should not be void because of the failure of the testator to use the form proper thereto, but should be construed as being in the form most favourable to the legatee, i.e., *per damnationem*. (See 298.)

**Orphitianum** (A.D. 178): conferred on children, as such, a first right of succession to their mother on her death intestate. (See 331.) •

**Pegasianum** (A.D. 75): conferred on the *heres fiduciarius* the right to retain one-fourth of the inheritance which he was required to transfer or distribute under *fideicommissa*. (See 319.)

**Tertullianum** (A.D. 158): conferred on mothers, as such, having the *ius liberorum*, the right of succeeding to their children on intestacy. (See 331.)

**Trebellianum** (A.D. 62) : provided that, on the transfer of the inheritance by the heir in pursuance of *fideicommissa*, the actions available to or against him should pass to the transferee or, in the case of only part of the inheritance being transferred, such actions should be apportioned between the heir and the transferee in proportion to their beneficial interests. (See 319.)

**Velleianum** (A.D. 46) : prohibited women from becoming sureties or undertaking liabilities on behalf of other persons in any form. (See 215, 216 and 218.)

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